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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 297

HELEN BISCHOFF,

Petitioner,

—v.—

NATHAN PERELES, JR., ETC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Helen Bischoff, on behalf of herself and the Estate of Josephine C. Hoyt, deceased, petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin entered in this case on December 20, 1963.[1]

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[1] Helen Bischoff (hereafter "Mrs. Bischoff") is the appointee of a testamentary power of appointment exercised by Josephine C. Hoyt, deceased (hereafter "Mrs. Hoyt"), in a will executed April 1, 1960 and duly probated December 5, 1961. Mrs. Bischoff's personal interest and her representation of the interest of Mrs. Hoyt's estate in this matter were duly recognized and approved by the Supreme Court of Wisconsin in a companion case reported as *Estate of Hoyt*, 22 Wis. 2d 209, 125 N. W. 2d 350 (1963) (Appendix B, *infra* pp. 12a-22a).

Nathan Pereles, Jr., is Guardian ad litem for minors and attorney for persons in military service; all of whom are present or future beneficiaries of the Patrick Cudahy Family Trust. He is the sole respondent who has opposed petitioner throughout this case.

Irene B. Brady and Elizabeth S. Casper, nieces of Mrs. Hoyt, stood neutral in the court of first instance but actively opposed

Opinion Below

The opinion of the Supreme Court of Wisconsin (Appendix A., *infra*, pp. 1a-11a) is reported at 22 Wis. 2d 198, 125 N. W. 2d 344 (1963). The opinion, findings of fact, conclusions of law and instructions to the Trustee by the Milwaukee County Court are not reported (A. Ap. pp. 135-168).[2]

Jurisdiction

The decision of the Wisconsin Supreme Court was rendered and judgment thereon entered on December 20, 1963. A timely petition for rehearing and motion for modification of the mandate were denied March 31, 1964. On June 26, 1964, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including July 17, 1964.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since it is claimed that petitioner and the Estate of Josephine C. Hoyt, deceased, have been deprived of property without due process of law and have been denied

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petitioner in the Court below. They may appear as respondents in this Court.

The First Wisconsin Trust Company appeared separately as Trustee of the Patrick Cudahy Family Trust and as Executor of the Last Will and Testament of Josephine C. Hoyt, deceased, and stood neutral in both capacities in the Courts below.

Michael F. Cudahy (Mrs. Hoyt's brother), Patrick and Anna M. Cudahy Fund and Richard D. Cudahy (a nephew) appeared in the court of first instance and remained neutral. They are named as respondents in the Court below but did not appear.

Michael J. Cudahy, Elizabeth D. Ickes, Jane D. Ickes and Anne McNally (nieces and nephew) appeared in the court of first instance in support of petitioner. In addition, Michael J. Cudahy appeared in the Court below in active support of petitioner.

[2] "A. Ap." refers to petitioner's (appellant's) appendix in the Wisconsin Supreme Court. No respondent's appendix was filed in that Court.

the equal protection of the laws within the meaning of the Fourteenth Amendment.

In addition, the validity of a state statute on grounds of repugnancy to Article I, Section 9 of the United States Constitution is drawn in question.

Questions Presented

1. Where an individual in an attempt to reduce his potential federal estate tax liability (a) relies on a statutory construction by this Court (subsequently expressly overruled as erroneous) and (b) is induced by a United States taxing statute (subsequently retroactively replaced) to make a local property disposition:

   (i) Is he entitled, in the complete absence of equities to the contrary, to equitable rescission of that property disposition in a State Court as a matter of due process of law within the meaning of the Fourteenth Amendment?

   (ii) Is a State Court's refusal to make equitable inquiry and to apply established state law affording equitable relief for mistake of law or failure of purpose, a denial of equal protection or a deprivation of property without due process of law within the meaning of the Fourteenth Amendment?

2. Does the judgment of the Milwaukee County Court apply Wis. Code Ann. §232.495 (1943) and Wis. Code Ann. §232.495 (1957) so as to unconstitutionally impair the obligations of the 1918 contract creating the Patrick Cudahy Family Trust? This question was not answered by the Wisconsin Supreme Court. We believe and urge, however, that the Court improperly avoided it.

Statement[3]

In June of 1918, Patrick Cudahy, together with his wife and seven children, including Josephine C. Hoyt, created the Patrick Cudahy Family Trust "in consideration of the premises and several benefits accruing to each of the parties hereto" (A. Ap. p. 109). The purpose of the trust was simply stated:

> "* * * it is the earnest wish and desire of said subscribers to confine membership in said THE PATRICK CUDAHY FAMILY COMPANY so far as practicable to those of the immediate family of said PATRICK CUDAHY, their descendants *and appointees*." (Emphasis supplied.)

Each of the settlors executed indentures dated June 7, 1918 and June 11, 1918 and transferred their respective shares of the Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee "To have and to hold the said shares of stock, IN TRUST NEVERTHELESS, for the uses and purposes, and upon the terms and conditions hereinafter expressed, and *none other* * * *" (A. Ap. p. 110) (emphasis supplied).

Two aspects of the trust indentures are pertinent here since each subsequently gave rise to an exposure to increased federal taxation upon the estates of the subscribers. Indeed, it was Mrs. Hoyt's effort, based upon competent legal advice, to eliminate such exposure that gives rise to this controversy.

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[3] This case involves a claimed reliance upon decisions of this Court as well as an inducement to act by United States Statute. Consequently, clarity in statement of the case necessitates inclusion of a recitation of certain judicial decisions and the holding or effect thereof. Such recitation is not intended as argument.

First, the Trust Indenture of June 7, 1918 provided that each subscriber should have a life income from the shares he or she contributed to create the trust (A. Ap. p. 111).

Second, the June 7, 1918 Indenture as amended by the June 11, 1918 Indenture conferred upon each subscriber a testamentary power to appoint one further natural life income from the shares he or she contributed to the Trust.[4]

At the time the Patrick Cudahy Family Trust was created, neither the life income to each subscriber nor the testamentary power to appoint one further life income, occasioned any exposure to increased federal taxation upon the estates of the subscribers.

In 1926, however, Congress made substantial adjustments in the statutes pertaining to the taxation of estates. Thereafter, the Commissioner of Internal Revenue sought to include the value of the Cudahy trust corpus in the federal gross estate of subscriber Irene C. Helmholz (a sister of Mrs. Hoyt) on three grounds: (1) the retained life interest; (2) a claimed power to revoke the entire trust; and, (3) the testamentary power of appointment. The Commis-

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[4] Other paragraphs of the Indentures provided that each member of the family "sold, assigned and transferred" to the trustee all of the shares of stock he or she owned (A. Ap. pp. 109-10); that the trustee would well and faithfully perform the trusts according to the terms of the Indentures (A. Ap. p. 114); that the trust would continue until "the death of the last surviving grandchild of Patrick and Anna M. Cudahy" or until the trust was terminated by *unanimous consent of all beneficiaries* or dissolution of the Patrick Cudahy Family Co. (A. Ap. p. 113); that any termination was to be subject to the rights of any "*testamentary appointees*" to continue to receive dividends for the remainder of his or her natural life (A. Ap. pp. 111-12, 114); that upon termination of the trust the identical shares of stock originally placed in the trust estate by each subscriber was to vest in his or her issue by right of representation (A. Ap. p. 113); that the trustee must hold the particular shares of stock (A. Ap. p. 110) and that the members of the Cudahy family or their descendants had power to sell or transfer his or her interest in the capital stock only upon the termination of the trust (A. Ap. pp. 113-14).

sioner's contentions were based upon Sections 302(c), (d) and (f) respectively of the Revenue Act of 1926.

The Board of Tax Appeals construed the Trust Indentures and ruled against the Commissioner on all three grounds, *Helmholz* v. *Commissioner of Internal Revenue*, 28 B. T. A. 165 (1933). In so doing, the Board expressly relied upon this Court's decision in *May* v. *Heiner*, 281 U. S. 238 (1929) which declared that the value of a trust corpus would not be included in a settlor's gross estate under Section 302(c) of the Revenue Act of 1926 solely because the settlor had retained a life interest in the trust. The Board further held that the trust in question was not revocable and the testamentary power of appointment was not general, hence these factors similarly did not warrant inclusion of the trust corpus in the subscriber's gross estate under Sections 302(d) or (f) of the 1926 Act.

The Commissioner did not appeal the retained life interest and power of appointment issues but did appeal to the Circuit Court for the District of Columbia on the power of revocation issue. He lost. *Helvering* v. *Helmholz*, 75 F. 2d 245 (1935). This Court granted certiorari and affirmed;[3] specifically declaring that no subscriber alone retained any power "to revoke, to alter or to amend" the trust (296 U. S. at p. 98).

Thus, as of 1935 it had been adjudicated that under then existing statutes, namely, Sections 302(c), (d) and (f) of the 1926 Act, the Trust format did not require inclusion of the Trust corpus in the subscriber's gross estate for federal estate tax purposes.

Congress, however, in the Revenue Act of 1942, again revised portions of the statutes relating to federal estate taxation. Sections 302(c) and (d) of the 1926 Act relating

[3] 296 U. S. 93.

to retained life interests and power of revocation, respectively, were not altered in any respect pertinent here, but Section 302(f) relating to powers of appointment was "drastically" revised in Section 403(a).[6]

Under the 1942 provisions, the value of the Cudahy trust corpus would have had to have been included in the subscriber's federal gross estates because of the testamentary power of appointment. Congress, however, induced the subscribers and other similarly situated to release their powers of appointment. It provided in the 1942 revision (§403(d)(3)):

> "The amendments made by this section *shall not apply* with respect to any power to appoint created on or before the date of the enactment of this Act *if it is released* before July 1, 1943." (Emphasis added.)[7]

In 1943 the Wisconsin legislature like a majority of other state legislatures amended the Wisconsin statute on powers by enacting Section 232.495 "so that Wisconsin grantees might, by partial release, change a general power to a special power which would qualify for exemption from federal estate taxation under the then existing provisions of Section 811(f)(2) of the Internal Revenue Code." *Expla-*

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[6] 3 Powell on Real Property, ¶392 (N. Y. 1952). This treatise contains a succinct description of the gyrations in federal estate taxation of powers of appointment in the period 1942-1951.

[7] This inducement was extended each year for nine years until Congress in the Powers of Appointment Act of 1951 retroactively replaced the 1942 Act: Current Tax Payment Act, '43 §10 (to March 1, 1944); 1943 Act §505 (to January 1, 1945); P. L. 511, 78th Cong. (to July 1, 1945); P. L. 95, 79th Cong. (to July 1, 1956); P. L. 393, 79th Cong. (to July 1, 1957); P. L. 112, 80th Cong. (to July 1, 1948); P. L. 635, 80th Cong. (to July 1, 1949); P. L. 137, 81st Cong. (to July 1, 1950); P. L. 578, 81st Cong. (to July 1, 1951).

[8] See, Restatement of the Law of Property, §235 Comment e, (1948 Supplement, St. Paul, 1949).

nation of Proposed Repeal and Recreation of Section 232.495 (Wisconsin Legislative Reference Library). (A. Ap. pp. 185-187).

In January of 1944, the subscribers obtained an opinion from counsel "concerning the status under the federal estate tax law of a power of appointment granted by the Patrick Cudahy Family Trust" (A. Ap. pp. 187-195).

Counsel advised that as a consequence of the Revenue Act of 1942 the value of the property subject to a power of appointment created by the 1918 Trust Indentures would be included in the subscribers' taxable estates; that the law as it then stood provided that any such powers would not be taxable if released before March 1, 1944; that the subscribers should take advantage of the grace period by executing a partial release; and that "Section 232.495 of the Wisconsin Statutes of 1943 expressly recognized the validity of a partial release of the kind here considered" (A. Ap. pp. 190-191):

> "It is accordingly our opinion that * * * if such release is duly made prior to March 1, 1944, the value of the property which is subject to the power will not, *under present law*, be subject to federal estate taxation in the estate of the donee of the power." (Emphasis supplied.)

Counsel summarized their opinion and again stated (A. Ap. p. 193):

> "That after such release the property covered by such powers will not, *under present law, be a part of the subscriber's estate for purposes of the federal estate tax.*" (Emphasis supplied.)

In addition to the foregoing advice, counsel stated that if any question should be raised by the Commissioner of

Internal Revenue as to including the value of the trust corpus in a subscriber's gross estate because of the retained life income

> "*reliance* would, of course, be placed upon *Helvering* v. *Helmholz*, 296 U. S. 83 and *Hassett* v. *Welch*, 303 U. S. 303, although the weight of the latter case as precedent has been seriously impaired by the *Hallock* case above cited" (A. Ap. p. 195). (Emphasis supplied.)

A copy of this opinion was circulated to Mrs. Hoyt (A. Ap. p. 198).

In accordance with their opinion, the law firm prepared a form of partial release for the four then surviving subscribers (A. Ap. p. 176). Mrs. Hoyt received a copy of the form on February 21, 1944 (A. Ap. p. 198) and executed it on February 25, 1944.

The release refers solely to the specific federal estate tax provisions then in effect (A. Ap. pp. 119-120). Thus, in "consideration of statutory benefits received and to be received" it irrevocably curtailed Mrs. Hoyt's power of appointment by limiting its exercise to those permissible without increased taxation under the Internal Revenue Code of 1939 as amended by the Act of 1942 (A. Ap. pp. 119-120). The release was purely gratuitous and does not purport to vest or transfer present or future rights in anyone or any class.

As of February 25, 1944, therefore, Mrs. Hoyt had been induced to release her power of appointment by the provisions of the Revenue Act of 1942.[9]

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[9] Namely, the carrot of exemption from increased taxation if the power of appointment was released within the allotted period and the stick of increased taxation if the power was not released within that period.

She had been advised that by executing the release, her federal taxable estate would not "*under present law*" include the value of the property covered by the power. Indeed, she was specifically further advised that if the Commissioner sought to include that property in her federal estate by reason of her retained life income, her other exposure to increased taxation, she could rely upon the statutory construction in prior decisions of this Court. (*Helvering* v. *Helmholz*, *supra*, and *Hassett* v. *Welch*, *supra*.)

Had Mrs. Hoyt been advised that under the then existing statutes and contrary to the then extant decision of this Court the retained life income provision *alone* would require inclusion of the value of the trust corpus in her federal gross estate, there would have been little point to executing a release of her power of appointment to avoid such inclusion. She was told she could rely on the decisions of this Court (one of them rendered in her sister's estate). By executing the release upon advice of counsel she did rely. That reliance was a mistake.

In 1949 this Court, in *Commissioner* v. *Church*, 335 U. S. 632, expressly overruled *May* v. *Heiner* and the *entire line* of cases based thereon as an erroneous statutory construction. It was held in *Church* that a settlor's retention of a life income in the trust he created was alone sufficient to warrant inclusion of the value of the trust corpus in the settlor's federal gross estate. The *Church* ruling explicitly had retroactive effect.

Thus, under the correct interpretation of the federal estate tax statute at the time she executed her release, the value of the trust corpus would have been includable in Mrs. Hoyt's federal gross estate by reason of the retained life income alone. Accordingly, the release to avoid

such inclusion by reason of her power of appointment was futile when executed. Contrary to her lawyer's advice, based upon the express, but erroneous, prior interpretation by this Court, execution of the release did not "under present law" prevent inclusion of the trust corpus in Mrs. Hoyt's federal gross estate.[10]

In 1951 Congress retroactively replaced the 1942 Revenue Act provisions pertaining to powers of appointment, Powers of Appointment Act of 1951.[11] Congress did so because:

> "Experience with the practical application of the provisions of the 1942 Act to pre-existing powers has demonstrated that the pre-1942 law should be restored as to those powers." Sen. Rep. No. 382, 82nd Cong. 1st Sess. (1951).

Thus, as a practical matter, the 1942 Act never existed; excepting, of course, the fact that it caused Mrs. Hoyt

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[10] Congress reacted promptly to the *Church* decision. Since the existing statute did not mean what this Court had been saying it meant for 18 years, Congress changed the statute to make the *May* v. *Heiner* rule an explicit statutory enactment, 63 Stat. at Large, C. 720, 81st Cong. 1st Sess. (1949). See also Sen. Rep. 831, 81st Cong. 1st Sess., U. S. Code Cong. Serv. 2172 (1949)). This subsequent statutory amendment is irrelevant here since it has no bearing on the state of law or facts existing at the time Mrs. Hoyt executed her release. At that time *May* v. *Heiner* and *Hassett* v. *Welch* were relevant, but erroneous, interpretations of the statute. Reliance on them was equally erroneous.

[11] "(c) "*Effective date*.—The amendments made by this section shall be effective as if made by section 403 of the Revenue Act of 1942 on the date of its enactment (applicable with respect to estates of decedents dying after October 21, 1942)." 65 Stat. at Large, 165, 82nd Cong. 1st Sess. (1951).

to execute the release here in question.[12] In net effect, Mrs. Hoyt never did receive the "statutory benefits received and to be received" which were recited as consideration for her release (A. Ap. p. 119).

It nowhere appears that Mrs. Hoyt, after having relied on advice concerning the 1942 federal tax changes, ever learned of the subsequent judicial interpretations and congressional changes in the tax law. Indeed, the lawyer who drafted her 1960 will had no knowledge of the 1944 "release" (A. Ap. pp. 177-78) and the Trust Company apparently had lost it in its files until after Mrs. Hoyt's death (A. Ap. pp. 169-70). From the date of the partial release of the power to the date of her death, Mrs. Hoyt continued to receive the retained life income. In the interim, the release had no visible effect.

Mrs. Hoyt executed her last will on April 1, 1960. She died testate on November 2, 1961, leaving neither husband nor issue. The will was duly probated December 5, 1961. By Article VI thereof, she exercised her testamentary power of appointment in favor of Mrs. Bischoff for life (A. Ap. pp. 103-104).

Mrs. Hoyt's testamentary plan was relatively simple. Her husband had predeceased her, and she had no children. Accordingly, she planned virtually all of her property to pass to her surviving brother, nieces and nephews, subject only to the life income in a portion thereof which she ap-

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[12] Indeed, if any tax had been paid under the 1942 provisions that would not have been owed under the retroactive 1951 provisions, a refund could be claimed. *Hollander v. United States*, 248 F. 2d 247 (2d Cir. 1959); *Lorenz v. United States*, 296 F. 2d 746 (Ct. Cl. 1961); *Verchler v. United States*, 170 F. Supp. 802 (Ct. Cl. 1959).

pointed to Mrs. Bischoff.[13] Part of the property passed by will and part by the *inter vivos* trust she had helped to create in 1918.

Following probate, the trust income was paid to Mrs. Bischoff in accordance with Mrs. Hoyt's exercise of her power. When the trustee discovered the partial release in its files, however, it halted the payments to Mrs. Bischoff because she was not a permissible appointee under the release.

The trustee petitioned the Milwaukee County Court for instructions as to whether income from shares contributed to the trust by Mrs. Hoyt should be paid in accordance with her will exercising the power or because of the release, in accordance with default of appointment provisions in the Trust Indentures of 1918 (A. Ap. p. 112).

In sum, the issue in the Milwaukee County Court was whether the release was valid and could be interposed to defea Mrs. Hoyt's otherwise proper exercise of her testamentary power of appointment. If it could, Mrs. Hoyt's testamentary plan would be destroyed, since the same persons who took under the substantial residuary clause of the will would also take under the default of appointment provisions of the trust (see Appendix B, *infra*, pp. 12a et seq.).

The Milwaukee County Court ruled it had complete jurisdiction in this matter (A. Ap. p. 142), held the release

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[13] Mrs. Hoyt's testamentary plan apparently met with the approval of her family. Her brother testified he expressed his "pleasure with what my sister had done in her will for" Mrs. Bischoff (A. Ap. p. 181). And, four of Mrs. Hoyt's nieces and nephews went on record in the court of first instance as supporting her last will (A. Ap. p. 163). One also supported Mrs. Bischoff in the court below.

to be effective and instructed the trustee to pay the relevant trust income in accordance with the default of appointment provisions of the trust. In so doing, it found, *inter alia*, that the subscribers, including Mrs. Hoyt, sought tax advice because of the adoption of the power of appointment provisions of the Revenue Act of 1942; that Mrs. Hoyt's release was executed in reliance on that advice; that the advice rendered was sound at the time it was rendered; that Mrs. Hoyt did not inform her will draftsman of the release; that she did not appear to have the release in mind when executing the will and that exercise of the power of appointment by the will was not effective to set aside or revoke the release which was by its terms irrevocable (A. Ap. pp. 146-159).

The Milwaukee County Court concluded, as a matter of law, that the release was valid when executed and irrevocable under both the common law and the statutes of Wisconsin (A. Ap. p. 158). It also concluded that Wisconsin Stat. 232.495 (1943) was enacted to bring Wisconsin law into harmony with federal tax law pertaining to release and that this section, together with the 1957 amendments thereto (which were held retroactive in this matter), "fully validated any questions as to the validity and effect of the release" (A. Ap. p. 158).

Mrs. Bischoff urged in the Milwaukee County Court that the release was forbidden by the provisions of the 1918 Trust Indentures which constituted a contract. Consequently, it was further urged that construing the 1943 release as valid or applying Wisconsin Stat. Sections 232.495 (1943) and 232.495 (1957) to authorize the release would unconstitutionally impair the obligations of the 1918 contract. Mrs. Bischoff also claimed that the application of

§232.495 (1957) retroactively to validate the 1944 release was prohibited by the due process clause of the Fourteenth Amendment. These arguments were rejected (A. Ap. pp. 199-206).

Mrs. Bischoff appealed to the Supreme Court of Wisconsin. The impairment of contract and due process argument were again urged in the briefs and oral argument. It was also contended that the Court should exercise its equitable jurisdiction to rescind or set aside the partial release because it was based upon a mistake of antecedent legal rights and wholly failed of its purpose.

The Wisconsin Court affirmed without reaching any of these arguments. Nonetheless, it found that the "equities of this case are strikingly in favor of Mrs. Bischoff," and that "Mrs. Hoyt's will clearly expressed her intention to have Mrs. Bischoff enjoy the benefits . . . of her power of appointment." But the Court posed the question it was obliged to answer strictly in terms of the law rather than the equity side of the Court, Appendix A, *infra*, p. 8a:

> "However, regardless of the equities, if Mrs. Hoyt's partial release of her reserved testamentary power of appointment was valid when it was made in 1944 and was not revocable, it follows that her testamentary appointment of Mrs. Bischoff was invalid."

The Court concluded that Wisconsin common law in effect in 1918 when the Trust Indentures were executed and in 1944 when the release was executed authorized releases such as Mrs. Hoyt's. It further held that the power of appointment contained in the Trust Indenture was a reserved property right not a contractual obligation with

respect to the power. For these reasons it concluded that the release was valid and by its own terms was irrevocable.

The Court did not consider whether Mrs. Hoyt's estate or Mrs. Bischoff were entitled to equitable rescission of the release. Moreover, it also did not reach the impairment of contract arguments.

Mrs. Bischoff petitioned for rehearing upon the ground that by stopping its inquiry with the finding at law that the release was a valid instrument when made, the Court ignored its equity jurisprudence, depriving Mrs. Hoyt's Estate and Mrs. Bischoff of property without due process of law and denying them the equal protection of the laws (see Appendix C, *infra*, p. 23a). A simultaneous motion was made to modify the mandate to send the case back to the trial court for a plenary equitable rescission suit if the Wisconsin Supreme Court deemed it necessary to garner additional facts to support such relief (see Appendix D, *infra*, p. 25a). Both the petition for rehearing and the motion to modify the mandate were denied without opinion on March 31, 1964 (Appendix E, *infra*, p. 26a).

Reasons for Granting the Writ

This case presents an important question involving the right of a federal estate taxpayer to equitable relief from an improvident act explicitly induced by statute and performed in direct reliance upon an erroneous decision of this Court. We believe the decision of the Wisconsin Supreme Court which declined to make inquiry into the availability of equitable relief is erroneous, conflicts in principle with decisions in three other states, and is contrary to the concern expressed by members of this Court in dissenting to decisions which expressly overrule established statutory constructions. Further, it denies to petitioner and Mrs. Hoyt the equal protection of the laws and deprives them of property without due process of law.

A second question is presented by the lower court's application of common law and Wisconsin Stats. §§232.495 (1943) and 232.495 (1957) to sustain the validity of the partial release here in question despite the provisions of the 1918 Trust contract. We believe such an application of these statutes unconstitutionally impairs the obligations of the 1918 contract and deprives Mrs. Hoyt's Estate and petitioner of property without due process of law. We further believe the Wisconsin Supreme Court improperly avoided answering this question.

A. *As to the First Question*

1. It is a well settled principle that this Court, unlike the British House of Lords, may overrule its prior statutory constructions where the Court's conception of the statute has changed.[14]

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[14] *Helvering* v. *Hallock*, 309 U. S. 106, 121-22; and see *James* v. *United States*, 366 U. S. 213; *Girouard* v. *United States*, 328 U. S. 61, 69-70; and *Commissioner* v. *Church*, 335 U. S. 632.

It is equally well established that a taxpayer may attempt to minimize the impact of federal taxation upon his estate by means which the law permits.[15] Such means, apart from the tax motive involved must, of course, be "the thing which the statute intended."[16]

This case is occasioned by the convergence of the foregoing principles. Here Mrs. Hoyt was explicitly induced by federal statute to execute a partial release of her power of appointment:[17]

> "The amendments made by this section *shall not apply* with respect to any power to appoint created on or before the date of the enactment of this Act *if it is released* before July 1, 1943." (Emphasis added.)

That release "was based on sound legal advice in the light of then known tax law."[18]

Such advice noted that if Mrs. Hoyt executed the partial release the property covered by such power would not "under present law" be part of her federal gross estate (A. Ap. p. 193).

In offering this opinion, counsel took cognizance that the Commissioner of Internal Revenue might seek to include such property in her federal gross estate in any event solely because of the retained life income (A. Ap. p. 194). But, Mrs. Hoyt was told this claim would be overcome by re-

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[15] *Gregory* v. *Helvering*, 293 U. S. 465, 468; and see *Knetsch* v. *United States*, 364 U. S. 361, 365.

[16] *Knetsch* v. *United States*, 364 U. S. 361, 365.

[17] The lower court declared in its judgment (A. Ap. pp. 165-66):

"That the Congress of the United States by the Internal Revenue Act of 1942 affected the federal estate tax laws governing powers of appointment and *authorized* the release of such powers by individuals having such powers;"

[18] Findings of Fact, A. Ap. p. 153.

liance upon this Court's decisions in *Helvering* v. *Helmholz*[19] and *Hassett* v. *Welch*[20] (A. Ap. pp. 194-95).

The lower court found Mrs. Hoyt relied on this advice and executed the release (A. Ap. p. 153).

The advice relied upon was erroneous because *Hassett* and *Helmholz* (to the extent it relied on *May* v. *Heiner*[21]) were erroneous. They were later expressly overruled on this issue, *Commissioner* v. *Church*, 335 U. S. 632. Thus, under the correct statutory construction as to retained life income and contrary to the *Hassett* (*May* v. *Heiner*) rule, the trust corpus would have been included in Mrs. Hoyt's federal gross estate irrespective of the release. Had this Court not sustained the erroneous *May* v. *Heiner* rule for 18 years, Mrs. Hoyt's counsel would have advised her that the federal estate taxes she sought to minimize by the release would be imposed anyway because of the retained life income. There would have been no reason for counsel to have recommended, or for Mrs. Hoyt to have executed, a release in such circumstances.

The futility of the release is underscored by the fact that Congress subsequently retroactively replaced the 1942 powers of appointment provisions which induced Mrs. Hoyt to execute the release in the first place.[22]

So long as taxpayers may act to minimize their federal taxes, this Court's decisions construing the taxing statutes are the principal guideposts for such action. If a taxpayer relies upon a construction which is overruled as erroneous, we believe due process, indeed, simple fairness, dictates

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[19] 296 U. S. 293.

[20] 303 U. S. 303.

[21] 281 U. S. 238.

[22] See fn. 11 and 12, *supra* p. 11.

that he should be allowed, in a suit in equity, to rescind any futile or improvident property disposition. At the very least a court of equity should be open to him to hear and determine his plea for equitable relief.

But the Wisconsin Supreme Court stopped short of an inquiry into the availability of equitable relief. Its opinion goes no further than to find that Mrs. Hoyt's release was a valid instrument when executed and irrevocable by its terms (Appendix A, *infra*, p. 9a). But this is the starting place for any equitable rescission action. There is no need to seek the aid of equity if the document is invalid.

The Wisconsin Court did not look behind the instrument to ascertain whether equitable relief should be granted despite its recognition that the over-all equities in the case were strikingly in favor of petitioner. It observed that while Mrs. Hoyt's purpose in executing the release was to obtain a tax benefit it was not important whether that benefit materialized (Appendix A, *infra*, p. 9a).

We do not suggest a taxpayer should be able to rescind every tax motivated property disposition where the tax relief does not materialize. We are concerned solely with rescission of such transfers where it can be shown the taxpayer relied to his detriment on an erroneous statutory construction by this Court. This is such a case.

2. Members of this Court and Congressional committees have expressed concern over the plight of taxpayers or other citizens who make property dispositions in reliance on erroneous statutory constructions by this Court.

Thus, Mr. Justice Burton noted in dissent in *Commissioner* v. *Church* (335 U. S. at p. 697):

> "It appears in the record that the settlor, in 1924, relied upon the advice of his family attorney and, as-

> suming the continuance of such a relationship, such attorney in subsequent consultations may well have counseled the settlor's further policy in express reliance upon May v. Heiner, 281 US 238, 74 L ed 826, 50 S Ct 286, 67 ALR 1244. With comparable situations evidently in mind, it had been suggested, in opinions which recently have considered the possibility of overruling May v. Heiner (US), supra, that no judgment overruling that case should be rendered by this Court without remanding the case to the District Court to ascertain whether or not the parties had in fact placed reliance upon the authority of that case and making special provision to avoid an unfair result if such reliance were found in fact to have existed."

And, the Senate Report accompanying a bill to amend the statute to eliminate the *Church* rule noted:[23]

> "Despite the fact the Congress has not seen fit to limit the effect of May v. Heiner with respect to transfers before March 4, 1931, the present Supreme Court had, after eighteen years, decided that its statutory construction in May v. Heiner was incorrect. In the words of Mr. Justice Reed's dissent from the Church decision:
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> "'In reliance upon a long settled course of legislative and judicial construction, donors have made property arrangements that should not now be upset summarily with no stronger reasons for doing so than that former courts and the Congress did not interpret the legislation in the same way as this Court now does.'"

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[23] Sen. Rep. No. 831, 81st Cong., 1st Sess. (1949 U. S. Code Congressional Service, p. 2172).

A related reliance problem was articulated by Mr. Justice Harlan, concurring in part and dissenting in part in *James* v. *United States*, 366 U. S. 213, 247:

> "Coming now to the other possible rationale for barring the prosecution of this petitioner, it might be argued that petitioner at the time he failed to make his return was not under any misapprehension as to the law, but indeed that at the time and under the decisions of this Court his view of the law was entirely correct. The argument not only seems to beg the question, but raises further questions as to the civil liability of one situated in the circumstances of this petitioner. Petitioner's obligation here derived not from the decisions of this or any other court, but from the Act of Congress imposing the tax. It is hard to see what further point is being made, once it is conceded that petitioner, if he was misled by the decisions of this Court, is entitled to plead in defense that misconception."
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> "The proper disposition of this case, in my view, is to treat as plain error, Fed. Rules Crim. Proc. 52 (b), the failure of the trial court as trier of fact to consider whatever misapprehension may have existed in the mind of the petitioner as to the applicable law, in determining whether the Government had proved that petitioner's conduct had been willful as required by the statute."[24]

In our view, the reliance of taxpayers upon this Court's decisions with respect to federal tax law should be given

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[24] "A definitive answer to this question apparently must await a subsequent decision of the Court, in which the opinion of the Justices now silent will control." 75 Harv. L. Rev. 40, *Note*, The Supreme Court, 1960 Term, 196 (1961).

uniform treatment throughout the nation.[25] Just as local property treatment must give way to federal definitions in the imposition of taxes, *Morgan* v. *Commissioner of Internal Revenue*, 309 U. S. 78,[26] so too should state remedies be uniformly afforded to federal taxpayers who improvidently rely on erroneous decisions of this Court. Compare *Byrd* v. *Blue Ridge Cooperative*, 356 U. S. 525, 534-540.

3. The refusal of the Supreme Court of Wisconsin to make equitable inquiry in this case conflicts in principle with the decisions of the Supreme Courts of three other states.

Thus, in a case without a substantive distinction the Supreme Court of Michigan made equitable inquiry and rescinded an irrevocable gratuitous transfer lawfully made to minimize federal income taxes, *Stone* v. *Stone*, 319 Mich. 194, 29 N. W. 2d 271 (1947).

In *Stone*, plaintiffs, upon the advice of competent tax counsel, based upon decisions of this Court, irrevocably transferred property to their two children in an effort to minimize income taxes. Subsequently, however, this Court reinterpreted the income tax law so that the taxpayers were subject to the higher brackets they sought to avoid. Thereupon, the taxpayers asked a decree in equity revoking the transfer and restoring the transferred property to them.

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[25] See Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1099 (1964); and see *Monarch Ins. Co.* v. *Spack*, 281 F. 2d 401, 406 (5th Cir. 1960).

[26] A converse protection of persons who have relied on earlier but erroneous decisions, is found in *Golpeke* v. *Dubuque*, 68 U. S. (1 Wall.) 175. See Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907, 919 (1962).

In ruling that the transferors were entitled to the aid of equity, the Supreme Court of Michigan in a carefully considered opinion observed:

> "There was a mutuality of mistake between donors and donees, not as to the legal effect of the instruments which created the gifts nor as to the rights of any of the parties under the terms and language of those instruments but as to the *antecedent and existing legal rights and duties of the parties in regard to the payment of income taxes under the requirements of federal law* and the powers of the donors to affect such rights and duties by the transfers in question.
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> • • • • •
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> "The instant cases involved no compromise of doubtful legal rights, no question of the right to retain the benefits of a bargain, no circumstance making restitution restriction inequitable to the donees or inexpedient because opposed to public interests. A taxpayer has the legal right to attempt by lawful means to minimize taxes (Commissioner of Internal Revenue v. Tower, supra, Gregory v. Helvering, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, 97 A. L. R. 1355) . . ."

In sum, the Michigan Court ruled that the plaintiffs in *Stone* (like Mrs. Hoyt) had been (pp. 192, 273);

> "Mistaken as to their own 'antecedent and existing rights.' Under such circumstances we think equitable relief is properly invoked."

Analogous results with respect to irrevocable trusts were reached by the Pennsylvania Supreme Court in *Irish* v. *Irish*, 361 Pa. 410, 65 A. 2d 345 (1945); by the New Jersey Supreme Court in *Commercial Trust Co. of New Jersey* v.

Kohl, 140 N. J. Eq. 294, 34 A. 2d 473 (1947); and *Hardy* v. *Bankers Trust Co.*, 137 N. J. Eq. 352, 44 A. 2d 839 (1945); and again by the Michigan Court in *Miller* v. *National Bank of Detroit*, 325 Mich. 395, 38 N. W. 863 (1949).

We believe these decisions are correct and the instant Wisconsin ruling erroneous. There is no reason in equity or fairness to deny relief from the property disposition here which (a) was gratuitous, (b) was based upon a statutory interpretation by this Court which was expressly overruled as an erroneous statutory interpretation, and (c) evoked no change in position, no detriment, indeed, no reliance thereon by anyone.

Wisconsin's denial of equitable relief in these circumstances has deprived Mrs. Hoyt's Estate and Mrs. Bischoff of property without due process of law.

4. In stopping its inquiry with its finding that the release was a valid and irrevocable instrument "having independent legal significance" the Wisconsin Supreme Court denied Mrs. Hoyt's Estate and petitioner the equal protection of the laws of Wisconsin and of the United States.

We have hitherto noted both the importance of uniform availability of relief from mistaken decisions of this Court and the rule in sister states according such relief. We do not suggest that Mrs. Hoyt's estate or petitioner have any vested right to the rights accorded citizens of other states. We do suggest, however, that an overriding federal policy is here involved. Namely, as a matter of *federal law*, petitioner and the Hoyt Estate are entitled to equitable relief. Denial of such relief in the State of Wisconsin is, we submit, a denial of equal protection of the laws of the United States to Wisconsin federal taxpayers.

We note, insofar as denial of equal protection of Wisconsin's laws is concerned that Wisconsin has a body of

common law that affords relief (a) to those who make gratuitous transfers because of a unilateral mistake of antecedent legal rights and (b) to those whose transfers totally fail of purpose.

Thus, where a deed was cancelled for failure of purpose in *St. Thomas Gemeinde* v. *St. Matthews Church*, 191 Wis. 340, 210 N. W. 942 (1926) the Court looked to the dominant purpose:

> "It was a mere nullity so far as the accomplishment of the dominant purpose of the transaction is concerned. Under such circumstances, there can be no doubt of the right of the plaintiff corporation to rescind the conveyance and to procure a cancellation of the deed."

And, in *Chicago St. P. M. & O. R. Co.* v. *Bystrom*, 165 Wis. 125, 133, 161 N. W. 358 (1917), where a quitclaim and release were cancelled because of unilateral mistake, this Court looked to the underlying consideration (165 Wis. at p. 133):

> "It is well settled that equity in a proper case will relieve against mistake. * * * where one deeds his property to another without consideration through mistake, equity will in a proper case, grant relief by rescission."

And, again in *DeVoin* v. *DeVoin*, 76 Wis. 66, 44 N. W. 384 (1890) where a contract was rescinded for mistake, the Court looked behind the instrument stating (76 Wis. at p. 70):

> "there was a mistake in one subject matter of the contract, to wit the amount of the firm liabilities, but for which no contract would have been made."

And still again, in *Jenkins* v. *Bradley*, 104 Wis. 540, 80 N. W. 1025 (1899):

> "[Where] the parties have acted in ignorance of, or under mistake as to, their antecedent legal rights, a court of equity may look into the transaction and grant relief:"

In this proceeding the Wisconsin court was sitting as a court of equity with all parties before it (Sections 231.36, 253.16(2)(b) Stats.). It found, moreover, that the equities were "strikingly in favor of Mrs. Bischoff". Yet it refused to act consistent with those equities, reasoning (Opinion, p. 6):

> "However, regardless of the equities, if Mrs. Hoyt's partial release of her reserved testamentary power of appointment was valid when it was made in 1944 and was not *revocable*, it follows that her testamentary appointment of Mrs. Bischoff was invalid." (Emphasis supplied.)

There is, however, an error in this syllogism. It does not take account of the equitable right of Mrs. Hoyt or her estate to obtain *rescission* of the partial release upon the grounds either of mistake or total failure of purpose.

The failure of the Wisconsin court to take account of the mistake and failure of purpose is to treat the mistaken irrevocable transfers of Wisconsin federal taxpayers differently from irrevocable transfers by other Wisconsin citizens. There is no constitutional reason for such a distinction.

B. *As to the Second Question*

1. It seems clear that the 1918 Trust Indentures were binding contracts,[27] and that they must be construed in

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[27] *Coolidge* v. *Long*, 282 U. S. 582, 593-95. The Supreme Court of Wisconsin tacitly concedes this to be so. Appendix A, *infra*, pp. 9a-10a. Even if it didn't, this Court may scrutinize the record to determine if there was a contract that might have been impaired, *Coolidge* v. *Long*, *supra*.

accord with the laws subsisting at the time of their execution:

> "The laws which subsist at the time and place of making a contract and where it is to be performed, enter into it and form a part of it as if they were expressly referred to or incorporated in its terms." *Wood* v. *Lovett*, 313 U. S. 362, 370 (1941).[28]

The issue here is whether the decision of the Milwaukee County Court applies State Statutes so as to impair the obligation of that contract and deprive petitioner and the Estate of Hoyt of property without due process of law. And, if so, whether the Supreme Court of Wisconsin improperly avoided determination of that issue.

If, under the law subsisting in 1918, Mrs. Hoyt was forbidden to release the power created in the trust contract, then a subsequent decision applying new state common law or new state statutes to authorize and give effect to such release impairs the obligation of the contract:

> "The obligations of a contract are impaired by a law which renders them invalid, *or releases or extinguishes* them, and impairment, as above noted, has been predicated of *laws which without destroying contracts derogate from substantial contractual rights.*" (Emphasis supplied.) *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 429-30 (1934).

We submit that under the contractual indentures and the laws which became a part thereof, Mrs. Hoyt's power could only be exercised by will, could not be released or extinguished by *inter vivos* act, and could not be revoked

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[28] Accord: *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 429-30.

or amended without the consent of the beneficiaries. Consequently, the 1944 partial release was unauthorized and a nullity because it was contrary to these terms of the contract, particularly the prohibition which obligated Mrs. Hoyt not to execute an *inter vivos* release or extinction of her power of appointment. Giving effect to the release impaired that obligation.

In paragraph Fourth(b) of the trust indentures of 1918, the subscribers were authorized to appoint "by last will and testament admitted to probate" (A. Ap. p. 111). Under this trust provision and the law of Wisconsin in 1918 Mrs. Hoyt could only exercise her power by will admitted to probate and was therefore obliged to retain her discretion to appoint unfettered until her death, Wis. Stats. §§ 232.40, 232.46.[29]

In 1918 Section 232.40 (R. S. 1849, c. 58, § 42) in pertinent part provided:

> "When a power of disposition is confined to a disposition by devise or will, the instrument must be a will duly executed * * * "

and Section 232.46 (R. S. 1898 § 2146) required that:

> "With the exceptions contained in the preceding sections the intentions of the grantor of a power as to the mode, time and conditions of its execution shall be observed * * * "

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[29] See *Ruggles* v. *Tyson*, 104 Wis. 500, 81 N. W. 367 (1899); *Farmers Loan & Trust Co.* v. *Mortimer*, 219 N. Y. 290, 294, 114 N. E. 389 (1916); *Dudley* v. *Peoples Trust Company*, 57 Misc. 230, 107 N. Y. Supp. 930 (Sup. Ct. Kings Co. 1907); *Learned* v. *Tallmadge*, 26 Barb. 443 (Sup. Ct. Albany Co. 1856); New York cases are relied upon because the Wisconsin statute was copied from the New York statute on powers and the Wisconsin Supreme Court ruled that where provisions were identical they should have the same construction. *Cawker* v. *Dreutzer*, 197 Wis. 98, 134-35, 221 N. W. 40 (1928).

These statutes were designed to carry out the manifest intention of the creator of the power in authorizing only testamentary exercise, that the holder of the power retain his discretion:

> "It did seem to be pretty clear on principle, that if a donee's power to appoint by will is to remain ambulatory he cannot debar himself from changing his mind not to exercise it; * * * if the creator of the testamentary power declares that it shall be exercisable by will only, he intends the donee shall be free to change his mind as circumstances shall require, so long as he lives." Gray, *Release and Discharge of Powers of Appointment*, 24 Harv. L. Rev. 515, 531 (1911).

As a New York court early held:

> "He studiously confines her power of giving the premises, to a power of *giving by Will*, a power in its nature revocable, in every period of life—the power given in that way to protect her against her own act. She had nothing *in point of interest*, but for her life. *In point of authority* she might by her will have made a disposition to take effect after death.
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> "The testator intended that she should give by will or not at all, and it is impossible to hold that the execution of an instrument or deed, which if it availed to any purpose, must avail to the destruction of the power which the testator meant should remain capable of execution until the amount of her death, can be considered in equity * * *." *Learned* v. *Tallmadge*, 26 Barb. 443 (Sup. Ct. Albany Co. 1856) citing *Reid* v. *Shergold*, 10 Ves. Jun. 370 followed by Cardozo, J., in *Farmers Loan & Trust Co.* v. *Mortimer*, 219 N. Y. 290, 294, 114 N. E. 389 (1916).

Because the power in question here was created by contract rather than by will or unilateral trust instrument, the traditional cases which speak of the intention of the grantor must in principle be applied here as meaning the collective intention of the parties to the 1918 contract as expressed therein. Hence, under these cases and statutes it is clear that not only was Mrs. Hoyt barred by statute from releasing, *inter vivos*, her power to appoint, but it was the intention of the parties to the trust agreement that she should be so barred.

The intention of the creator of the power that discretion remain open until death is interpreted to preclude *inter vivos* exercise, release or extinguishment of a testamentary power because, as Professor Gray observed (24 Harv. L. Rev. at p. 531):

> "* * * the distinction between *exercising* a testamentary power by deed and *releasing* such a power by deed, is, on principle, untenable."

The New York Court of Appeals had construed Sections 232.46 and 232.40 prior to the execution of the 1918 Indentures as protecting the creator's intentions by prohibiting *inter vivos* extinction of a testamentary power.[30]

> "The power of appointment was general and beneficial (Real Prop. Law (Cons. Laws ch. 50), §§ 135, 136) but none the less there were limitations upon the manner of its execution. It was to be executed not by deed, but by will, and a will in its very nature is ambulatory.

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[30] Under the statutory scheme any powers reserved by the grantor of any conveyance "shall be subject to the provision of this chapter in the same manner as if granted to another" Wis. Stat. § 232.32. Moreover, Mrs. Hoyt had "no power in herself alone to revoke, to alter or to amend." *Helvering* v. *Helmholz*, 296 U. S. 93.

> The exercise of the power was to represent the final judgment, the last will, of the donee. Up to the last moment of his life he was to have the power to deal with the share as he thought best (Thacker v. Key, L. R. 98 Eq.) 408; Matter of Bradshaw, L. R. (1 Ch. 1902) 436, 448). To permit him to bargain that right away would be to defeat the purpose of the donor. Her command was that her property should go to her son's issue unless at the end of his life it remained his will that it go elsewhere. * * * To hold otherwise would not only be to nullify the will, it would also be to nullify the statute. The statute says that a power of appointment by will may not be executed by grant (Real Prop. Law, §§ 167, 168). *Farmers Loan & Trust Co.* v. *Mortimer*, 219 N. Y. 290, 294, 114 N. E. 389 (1916) (Justice Cardozo interpreting the New York statute identical to Wisconsin's Section 232.40).

Similarly, in *Chase National Bank* v. *Chicago Title & Trust Co.*, *supra*, the New York Appellate Division held a release, *executed by the grantor, grantee and trustee* was

> "[I]neffective to operate as an extinguishment of Mrs. McCormick's [testamentary] power, because to permit the same would, in effect, permit her to do more than the scope of her power permited, i.e., to extinguish her power by a deed."

Finally, the New York Appellate Division held: "The statute does not contemplate [release] even if we assume [release] to be lawful otherwise." *Matter of Matthews*, 255 App. Div. 80, 85, 5 N. Y. S. 2d 707 (2d Dep't), aff'd without opinion, 279 N. Y. 732, 18 N. E. 2d 683 (1938). The very fact that the Wisconsin legislature found it necessary in 1943 to enact a release statute confirms this conclusion."

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[1] Wis. Stat. § 232.495 (1943).

We submit therefore that Wisconsin Stats. §§ 232.40 and 232.46 and the foregoing decisions interpreting such sections, both of which became part of the 1918 contract, prohibited Mrs. Hoyt from releasing or otherwise extinguishing her testamentary power by release in 1944.

The judgment of the Milwaukee County Court declares, however,

> "(12) That the Wisconsin legislature in 1943, in 1951 and finally in 1957 by Section 232.495 adequately provided for the release of both general and special powers and for the successive release of any powers which may mutually have been partially released. That such acts by the legislature authorized the 'partial release' of the powers of appointment executed in 1944 by the said members of the Cudahy family."

This application of the 1943 and 1957 statutes to authorize the release in question unconstitutionally impaired the obligations of the 1918 contract to maintain that discretion unfettered until death. See *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 429-30 (1934).

2. The Wisconsin Supreme Court improperly avoided determining whether the 1918 contract was impaired by the County Courts retroactive application of Wis. Stats. § 232.495 (1943) and Wis. Stats. § 232.495 (1957) to sustain the partial release. It did so by ruling that the contract theory espoused by petitioner had no application:

> (1) because the power of appointment was a "reserved property right as distinguished from a contractual or promissory obligation with reference to a power" (Appendix A, *infra*, 88); and,
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> (2) because the power of appointment which Mrs. Hoyt held was subject "to her right to release such power in

whole or in part, and this right existed pursuant to the common law" (Appendix A, *infra*, pp. 9a-10a).

Both of these rulings are contrary to the provisions of the Wisconsin Statute on powers and neither is supported by any prior decision in Wisconsin or elsewhere.

Certainly it cannot be gainsaid that Mrs. Hoyt's power of appointment was created in the 1918 Trust Contract. Whether the power was created by reservation or otherwise the contract sets forth the nature of the power and the terms and conditions of its exercise (A. Ap. pp. 111, 117) and the Wisconsin Statute required that it be construed exactly as if granted to another, Wis. Stats. § 232.32. Consequently, the Wisconsin Supreme Court could not properly avoid the contractual theory, *Coolidge* v. *Long*, 282 U. S. 582.

Secondly, there is no foundation for the Wisconsin Court's declaration that Mrs. Hoyt's testamentary power existed under "the common law". No case is cited for the proposition. Indeed no Wisconsin Court has ever heretofore sustained a release of power of appointment. More significantly, the common law in so far as it relates to the powers relevant here was expressly abrogated by Wisconsin statutes in effect since 1849.

> "232.01. *How far abolished.* Powers, except as authorized and provided for in this chapter, are abolished; and the creation, construction and execution of powers shall be governed by the provisions herein contained."

In addition to the language of Section 232.01 itself, our conclusion as to the complete abrogation of a common law relating to powers is supported by the original New York

Revisers' Notes;[32] the other provisions of the chapter on powers; and a decision of the New York Court of Appeals interpreting an identical statutory provision.

In *Cutting* v. *Cutting*, 86 N. Y. 522, 430-37 (1881) the New York Court of Appeals construed the statutory provision from which Section 232.01 was copied. It declared:

> "All of the facts in this case arise since the adoption of the Revised Statutes, and the solution of the legal questions presented by those facts must be made by the application to them of the provisions of article 3, title 2, chapter 1, part 2 of those statutes, entitled 'of Powers.' Thereby, powers, as they then existed by law, were abolished; and thenceforth, the creation, construction, and execution of powers were to be governed by those provisions (1 R. S. 732, §73).
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> * * * * *
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> "But we may go further, and we will find in the report of the revisers, evidence of an intent to abrogate the rules of English equity in relation to powers, and to make the article 'of powers,' a complete and exclusive code on that subject."

The 1828 Original New York Revisers' Notes declare an intention to eliminate the entire doctrine of powers theretofore existing (5 Edmond's Statutes at Large, pp. 325, 326, 330, Albany 1863):

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[32] We refer to the New York Revisors' Notes for two reasons: (1) "Revisers' Notes are treated as of much importance in ascertaining the legislative intent," *State ex rel. Glake Steel Tubes Co* v. *Lyons*, 183 Wis. 107, 197 N. W. 578 (1924); *Hillier* v. *Lake View Memorial Park*, 208 Wis. 614, 621, 243 N. W. 406 (1932), and (2) the Wisconsin Court, in accord with the general rule, declared the Wisconsin statute should have the "same interpretation here as there [*i.e.* New York]" where the provisions are identical, *Cawker* v. *Dreutzer*, 197 Wis. 98, 221 N. W. 40 (1928);

"We propose, therefore, an entirely new division of powers, not merely as expressed in terms which at once suggest the reason of their adoption, but because it rests on substantial and practical distinctions. In order to classify powers we look to their extent, and to the objects which they are meant to attain, since it is from the differences that subsist between them in these respects that the different rules by which they are governed, are and must be derived.

* * * * * *

"In conclusion we remark, that on the subject of powers the legislature may act with entire safety. They will disturb nothing. Powers are almost unknown in this state, and their use to the extent in which they are now authorized by law is hardly consistent with our habits of society and general modes of alienation."

Indeed, it has been specifically declared of an identical statute that "the statute does not contemplate [release] even if we assume [release] to be lawful otherwise." *Matter of Matthews*, 255 App. Div. 80, 85, 5 N. Y. S. 2d 707 (2nd Dept.); without opinion, 279 N. Y. 732, 18 N. E. 2d 683 (1938).

Accordingly, we conclude that there has been no common law right to release in Wisconsin since 1849.

We submit, therefore, that the Wisconsin Supreme Court, by finding an unprecedented common law right to release and by ignoring the statutory abrogation of the common law of powers improperly avoided determining whether the lower court, by relying on Wis. Stats. § 232.495 (1943) and 232.495 (1957) as authorizing the release, impaired the obligations of the 1918 contract and deprived petitioner and Mrs. Hoyt's Estate of property without due process of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

MARTIN R. PAULSEN,
Counsel to Petitioner.

July 17, 1964

APPENDIX A

Opinion in re Patrick Cudahy Family Trust, Etc.

IN

SUPREME COURT

STATE OF WISCONSIN

AUGUST TERM, 1963

No. 90

In re Patrick Cudahy Family Trust Under Trust Indenture, etc.:

HELEN BISCHOFF,

Appellant,

MICHAEL J. CUDAHY,

Respondent-Appellant,

—v.—

FIRST WISCONSIN TRUST CO., TRUSTEE, ETC., *et al.*,

Respondents.

APPEAL from a judgment of the county court of Milwaukee county: R. J. MURDOCH, *Judge*: *Affirmed.*

Mrs. Helen Bischoff and Michael J. Cudahy appeal from that part of the judgment entered on March 29, 1963, which interprets the legal effect of certain documents involving the Patrick Cudahy Family Trust. The First Wisconsin Trust Company as trustee petitioned the county court to determine the proper distribution of a portion of the trust income.

Opinion in re Patrick Cudahy Family Trust, Etc.

In June, 1918, Patrick Cudahy, together with his wife and seven children, including Josephine C. Hoyt, created the Patrick Cudahy Family Trust. Each settlor transferred his respective shares of the capital stock of the Patrick Cudahy Family Company to the First Wisconsin Trust Company as trustee.

The trust was created so that the shares would remain in the family. In the fourth clause of the 1918 trust agreement the duties of the trustee are described in the following terms:

> "FOURTH: To pay and distribute the net amount of such dividends remaining after the payment of expenses of administration as aforesaid from time to time as follows, to-wit:
>
> "(A) To each subscriber as long as he or she shall live the net dividends received in respect of the shares of stock by him or her respectively transferred and assigned as aforesaid.
>
> "(B) Upon the death of any subscriber, to pay to such then living appointee or appointees as such deceased subscriber in and by last will and testament admitted to probate shall designate and appoint, the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid or such portion or portions thereof as such appointment shall direct. No appointment hereunder shall be effective for a longer period than the natural life of the appointee.
>
> "...
>
> "(C) If any subscriber shall die without making appointment as aforesaid, or if any appointee of such subscriber shall not be entitled to take or upon the

termination of the term of any appointment, then said trustee shall from time to time pay the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid, or such portion thereof as shall be affected by such failure to appoint or inability of the appointee to take, or termination of the term of appointment, to the issue of such subscriber living at the time of distribution proportionately by right of representation.

"(D) In case a subscriber shall die without surviving issue, or the issue of a deceased subscriber shall become extinct after the death of such subscriber, and either (1) such subscriber shall not have made appointment as aforesaid, or (2) the appointee shall not be entitled to take, or (3) the term of appointment shall have expired, then and in either of such events the said trustee thereafter shall pay the net dividends in respect of the stock transferred by such deceased subscriber or that portion thereof affected by either or any of the foregoing contingencies to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation."

By letters of January 19, 1944, and January 27, 1944, legal counsel advised Mrs. Hoyt and other subscribers of the 1918 trust agreement having a similar power of appointment that certain federal estate tax benefits would be received if Mrs. Hoyt would "partially release" powers given her under the 1918 agreement. Accordingly, Mrs. Hoyt executed such a partial release on February 25, 1944, and a portion of it read as follows:

"NOW, THEREFORE, In consideration of statutory benefits received and to be received, and intending to

be legally bound, I do hereby irrevocably and forever release, relinquish, renounce and surrender in part and reduce and limit any and all right and power that I have under said Trust Indenture, as amended, to designate and appoint a person or persons to receive and to whom the Trustee shall pay the dividends received by the Trustee in respect of the shares of stock by me transferred and assigned pursuant to the terms of said Trust Indenture, as amended, or to designate and appoint a person or persons who may enjoy any other rights or benefits under said Trust Indenture, as amended, including any and all right and power that I have under that clause of said original Trust Indenture reading as follows:

"'FOURTH:

"...

"'(b) Upon the death of any subscriber, to pay to such then living appointee or appointees as such deceased subscriber in and by last will and testament admitted to probate shall designate and appoint, the net dividends received in respect of the shares of stock by such subscriber transferred and assigned as aforesaid or such portion or portions thereof as such appointment shall direct. No appointment hereunder shall be effective for a longer period than the natural life of the appointee.'

so that forever hereafter my right and power to appoint under the aforesaid quoted paragraph shall be limited to those natural persons within the following described class and shall not include any others, to-wit: my husband, my descendants, the descendants of my husband, the spouses of any such descendants, and any

natural persons who may qualify as donees described in Sections 812 (d) and 861 (a)(3) of the United States Internal Revenue Code as now in effect. The term 'descendants' as used herein shall include all persons within that term as it is used in Section 811 (f)(2)(A) of the United States Internal Revenue Code as now in effect; and the Trustee of said trust now or any time hereafter acting is hereby wholly discharged from any and all obligations with respect to any appointee or appointees of mine other than to those within the class by this instrument limited."

Four other subscribers with a similar power of appointment executed identical releases at approximately the same time as Mrs. Hoyt. Mrs. Hoyt died in 1961, her husband having predeceased her in 1954. The attorney who prepared her will testified that he had been unaware of the partial release executed in 1944. Pertinent portions of her will read as follows:

"I give and bequeath to Helen Bischoff, if she shall survive me, the sum of Ten Thousand Dollars ($10,000.00).

"...

"I give and bequeath to Helen Bischoff, my diamond watch, my sapphire ring, my household furniture, furnishings, personal effects and silver not herein bequeathed, and any automobile that I may own at the time of my death.

"...

"I give and bequeath to Helen Bischoff, for her lifetime only, the net dividends received in respect of the Nine Hundred Ninety-nine (999) shares of stock in the Patrick Cudahy Family Company, transferred and assigned to me, of which the Wisconsin Trust Com-

pany, now First Wisconsin Trust Company, is Trustee under a Trust Agreement dated June 7, 1918, and any supplemental agreements thereto, it being my intention to exercise the power of appointment given to me under said trust instrument.

"I give, devise and bequeath all the rest, residue and remainder of my estate of every kind, nature and description, and wherever situated, in equal shares, to my surviving nephews and nieces."

The court below concluded that Mrs. Bischoff did not come within the class of appointees described in the partial release and held that Mrs. Hoyt had no power to appoint Mrs. Bischoff. The county judge was of the opinion that the 1944 release executed by Mrs. Hoyt was effective and that the attempted appointment of Mrs. Bischoff in the will was invalid. This was the position taken by a guardian *ad litem* who had been appointed to represent certain minors and persons in military service.

The effect of the judgment of the court below is that the portion of the estate of Mrs. Hoyt which would have passed to Mrs. Bischoff had her testamentary appointment been effective passes instead to those who have a beneficial interest under the trust.

Statutes Involved

1943 Stats.:

"232.495 Release of powers. (4) A power to appoint real or personal property, whether acquired prior to or subsequent to July 15, 1943, which is exercisable by deed, by will, by deed or will, or otherwise, in favor of the grantee or holder of the power, his estate, his

creditors, or the creditors of his estate is releasable, either with or without consideration, by written instrument signed by the grantee or holder.

"(2) A power to appoint described in the next preceding subsection is releasable with respect to the whole or any part of the property subject to such power and is also releasable in such manner as to reduce or limit the persons or objects or classes of persons or objects in whose favor such power would otherwise be exercisable.

"(3) It is declared that such releases described in the two preceding subsections are in accordance with the public policy of this state and are valid and effectual whether heretofore or hereafter made.

"(4) Nothing herein contained shall be deemed to prevent the release of any power which was releasable, in whole or in part, prior to July 15, 1943."

1957 Stats.:

"232.495 Release of powers. (1) The grantee of any power to appoint real or personal property may, unless the instrument creating such power expressly otherwise provides:

"(a) At any time completely release his power.

"(b) At any time or times release his power in any one or more of the following respects:

"1. As to the whole or any part of the property which is subject thereto;

"2. As to any one or more persons or objects, or classes of persons or objects, in whose favor such power is exercisable;

"3. So as to limit in any other respect the extent to or manner in which it may be exercised.

"(2) Any such release may be effected, either with or without consideration, by written instrument signed by the grantee or holder.

"(3) A release of a power executed prior to September 1, 1957 has the same effect as if this section had been in effect at the time such release was executed."

GORDON, *J.*

"For justice, tho' she's painted blind
Is to the weaker side inclin'd."

—Samuel Butler, Hudibras, Part III, Canto III

The equities of this case are strikingly in favor of Mrs. Bischoff. The latter was Mrs. Hoyt's friend, nurse and companion for almost seven years. Mrs. Hoyt's will clearly expressed her intention to have Mrs. Bischoff enjoy the benefits which would have resulted from the testamentary exercise of her power of appointment in favor of Mrs. Bischoff. A nephew of Mrs. Hoyt, Michael J. Cudahy, vigorously supported Mrs. Bischoff's position in this court.

However, regardless of the equities, if Mrs. Hoyt's partial release of her reserved testamentary power of appointment was valid when it was made in 1944 and was not revocable, it follows that her testamentary appointment of Mrs. Bischoff was invalid.

We must first resolve whether the partial release of the power of appointment was effective. The execution of the

instrument by Mrs. Hoyt on February 25, 1944, was a deliberate and meaningful act. Prior to its preparation and execution, Mrs. Hoyt had the guidance of an analytical report from her lawyers; they recommended the partial release in order to diminish federal estate taxes on Mrs. Hoyt's estate. We consider that in the issue before us it is immaterial whether the tax savings which Mrs. Hoyt sought to obtain were ultimately obtained. The document had independent legal significance even though its purpose was to gain a specified tax benefit.

Mrs. Bischoff contends that Mrs. Hoyt was unable to release the reserved power of appointment because to do so would breach a contractual arrangement with her co-settlors. A trust, by its terms, may embody contractual burdens amongst those who establish the trust. However, we are unable to apply the contract theory espoused by Mrs. Bischoff to the instant trust. With reference to the shares of stock which Mrs. Hoyt transferred to the trust, she reserved the life income therefrom and also reserved the right to designate by her will who was to receive the dividends from such shares for the natural life of the appointee. Upon default in the exercise of the appointment, the trust instrument provided that the income would be enjoyed by her issue or, if none, by the surviving settlors or their issue. Mrs. Hoyt died without leaving a surviving spouse or any surviving issue.

We construe the provision for a power of appointment in the instant case to constitute a reserved property right in the settlor as distinguished from a contractual or promissory obligation with reference to the power.

In our opinion, the power of appointment which Mrs. Hoyt held under the 1918 trust agreement was subject to her right to release such power in whole or in part, and

this right existed pursuant to the common law. No one could claim an interest as a prospective appointee under this power of appointment. Mrs. Hoyt was free to designate any natural person or persons whom she chose to appoint, and she was not under any duty to exercise the power. This, therefore, was not a special power in trust as contemplated in sec. 232.22, Stats., and considered in *Ruggles* v. *Tyson* (1899), 104 Wis. 500, 517, 79 N. W. 766, and in *Will of Uihlein* (1953), 264 Wis. 362, 380, 59 N. W. (2d) 641.

Since it was not a special power in trust and since it was releasable under the common law, Mrs. Hoyt's partial release of her power was not dependent upon either the 1943 or the 1957 versions of sec. 232.495, Stats. We do not construe the 1943 statute as restricting the right of a donee of a power to release such power. The 1943 adoption of sec. 232.495 was designed to take advantage of certain federal estate tax exemptions. See Explanation of Proposed Repeal and Recreation of Sec. 232.495, relating to ch. 650, Laws of 1957, Wisconsin Legislative Reference Library files. This section may not be construed as abbreviating the common law right to release powers. Under the common law, all powers were releasable except powers in trust. Simes and Smith, The Law of Future Interests (2d ed.), p. 525, sec. 1057.

Restatement, Property (1948 Supp.), p. 506, sec. 335, concludes as follows:

> "All special powers of appointment can be released by the donee unless the donor in creating the power manifests an intent that it shall be non-releasable."

The authors, at page 508, report that Wisconsin statutory expressions were merely declaratory of pre-existing non-statutory law.

Had Mrs. Hoyt been the donee of a power in trust, she could not have extinguished that power in contravention of the plan of distribution created by the donor. It is arguable that even a power in trust is releasable under the 1957 version of sec. 232.495, Stats.; however, we are not required to construe the scope of that version of the statute in the instant case. The rule which precludes the release of a power in trust does not prevent the release of a power wherein the donee is giving up something which is unqualifiedly his. In this light, Mrs. Hoyt, who was both the donor and the donee of the power, possessed the right to appoint by her will, to fail to appoint or to extinguish her power in whole or in part.

The partial release by its own terms evidences that such action was made "irrevocably and forever." Whether Mrs. Hoyt at the time of the execution of her will was mindful of her pre-existing release, or whether she had forgotten such pre-existing document, is not of significance. Her partial release was valid when made, and she divested herself of the authority to revoke such release. The trial court correctly ruled that Mrs. Bischoff could not qualify as an appointee of the power under Mrs. Hoyt's will.

By the Court.—Judgment affirmed.

APPENDIX B

Opinion in re Estate of Josephine C. Hoyt

IN

SUPREME COURT

STATE OF WISCONSIN

AUGUST TERM, 1963

No. 2

In re Estate of Josephine C. Hoyt, Deceased:

FIRST WISCONSIN TRUST CO., Ex'r., etc.,

Appellant,

—v.—

HELEN BISCHOFF,

Respondent

APPEAL from an order of the county court of Milwaukee county: R. J. MURDOCH, Judge. *Affirmed.*

This case is an offshoot of Case No. 90, *In re Patrick Cudahy Family Trust Under Trust Indenture, etc.: Helen Bischoff, Appellant-Respondent, Michael J. Cudahy, Respondent-Appellant* v. *First Wisconsin Trust Co., Trustee, etc., et al., Respondents*, also decided today. The facts as stated in that case are pertinent here and they are incorporated herein.

On entry of the trial court's decision on the merits, upon the petition of the remaindermen's attorneys, the court ordered that their fees and disbursements be paid out of the trust.

The respondent, Mrs. Bischoff, petitioned the court for payment of fees and costs from either the trust or the estate. The court, in an oral opinion from the bench, denied respondent's request for payment of fees from the trust, but ordered payment of respondent's fees and costs from the estate. The trial court concluded:

> "ordinarily the executor would have the duty to present the facts to the extent of our upholding the validity of the wishes of the testatrix as to the power of appointment. The executor cannot be blamed in this matter for not having taken an active part in its situation as reflected in the action in this case. I am satisfied that where the action of the testatrix at the time of the execution of the will is attacked, that the executor of the will is bound to try to sustain the wishes of the testatrix, as stated in the will. I am satisfied that Messrs. Meyer and Paulsen took the part in these proceedings of the testatrix, and I believe that their fees should be paid out of the estate of Josephine Hoyt."

On January 21, 1963, the trial court entered an order directing the appellant to pay respondent's attorneys fees and expenses from the estate of Josephine C. Hoyt. First Wisconsin Trust Company appeals from that order.

WILKIE, *J.* Two issues are presented on this appeal:

1. If provisions of a will are unambiguous on their face, and the document by its terms creates no potential conflict between specific beneficiaries or between specific beneficiaries and residuary legatees, does the executor have a duty to defend the estate against a claim that certain personal property is not part of such estate because of the effect of a prior document executed by the testatrix or testator?

An examination of the relevant provisions of the will of Josephine C. Hoyt reveals that the intentions of the testatrix were expressed in unambiguous terms. This is especially true of Article VI, whereby Mrs. Hoyt attempted to convey a life income in the net dividends of the 999 shares of capital stock to Helen Bischoff, the provision that was the subject matter of the litigation in the trial court. There was no occasion to "construe" the provisions of the will. The critical issue was the impact of the partial release upon the terms of the trust. The resolution of this question necessarily determined whether Article VI was effective. It did not determine the meaning of that provision of the will. Therefore, cases which have defined will construction proceedings as "will contests" within the meaning of sec. 324.11, Stats., and sec. 324.12, Stats.,[1] and have held that a losing party in such proceeding is not entitled to fees and costs from the estate, are not relevant to this dispute.

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[1] "324.11 Costs, when allowed, judgment for. Costs may be allowed in all appealable contested matters in county court, excepting in jury trials, to the prevailing party, to be paid by the losing party or out of the estate as justice may require; and when costs are allowed they shall be taxed by the judge at the rates allowed in circuit court and upon like notice; but the attorney fees shall not exceed twenty-five dollars, and shall be allowed only when an attorney appears for the prevailing party. When costs are allowed, the court shall render judgment therefor, stating in whose favor and against whom the same is rendered and the amount thereof; and a list of the items making such amount shall be filed with the papers in the case."

"324.12 Costs in will contests. Costs shall not be awarded to an unsuccessful contestant of a will unless he is a special guardian appointed by the county or circuit judge, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent."

In re Dange's Estate, 1899, 103 Wis. 497, 79 N. W. 786; *Will of Weidman*, 1926, 189 Wis. 318, 207 N. W. 950; *Estate of Gallagher*, 1938, 231 Wis. 624, 291 N. W. 355.

Moreover, the will by its terms did not create a potential conflict between a specific beneficiary and a residuary legatee. Had the dividend income passed to residuary legatees *under the will*, upon a failure of the specific bequest, the executor could have contended that as a trustee for *all* interested parties under the terms of the will he should not be forced to choose among competing parties who could relate their claims to the will.[2] Under these circumstances, a conflict between a specific beneficiary and remaindermen under the terms of the will, we have held that each party must pay his own costs of litigation.[3]

In the instant case, the bequest to Helen Bischoff was not effective because of the partial release; hence, the dividend income passes to residuary legatees under the trust. The rationale of the *Will of Larson, supra*, is not relevant.

In those circumstances, where the provisions of the will are unambiguous, creating no will construction problem, and such provisions do not create conflict between specific beneficiaries and residuary legatees, under the will, and further the adversary claim is not made by a creditor of the estate, the executor is under an obligation to defend the estate distribution scheme. His role as trustee for the beneficiaries and creditors requires him to defend their interests against claims made by persons outside the class reached by his position of trust. As long as the estate distribution plan contains no inherent conflict, and the matter

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[2] "An executor . . . is essentially a trustee, representing all persons interested in the estate or who may have any interest therein, including creditors." 1 Callaghan's Wisconsin Probate Law (6th ed.) p. 350, sec. 7.240.

[3] *Will of Larson*, 1933, 211 Wis. 237, 247 N. W. 880.

[4] 1 Callaghan's Wisconsin Probate Law, *supra*.

at issue does not involve a conflict between an estate creditor and a beneficiary, his role as trustee, *by definition*, requires him to protect the estate by litigation if necessary. His defense of the position of the interested parties is the justification for his compensation from the estate. Because all interested parties benefit from his efforts, all should contribute.

If the executor forsakes the interests he is appointed to protect, he has no rational basis from which he can claim compensation.

The appellant argues that even if it has a general duty to defend the estate under the circumstances of this case, the matter at issue, the life income in dividends, was never a part of the estate. This argument is irrelevant. Although we have determined that the power of appointment was circumscribed by the release, the focus is upon the executor's obligation prior to the formal commencement of the litigation, not at the termination of the lawsuit. We cannot assess the executor's duty to defend retrospectively, concluding that because the beneficiary ultimately failed to prevail, the executor never had a duty to defend her interest. To properly defend an interest by litigation, the defender need not prevail. Certainly the substantive issues surrounding the effect of the release were worthy of adjudication. At the commencement of the litigation the effect of the partial release upon Article VI of the will was not authoritatively determined. Helen Bischoff's view of the matter deserved effective advocacy. Under the circumstances of this case the appellant was obliged to provide such defense.

2. Under the above circumstances, if because of a conflict of interest, the executor is unable to defend against

such claim, may the party so defending recover attorneys fees and disbursements from the estate?

The appellant's failure to provide representation in this case was not caused by a conscious violation of its role as executor. Because of its position as trustee under the Patrick Cudahy Trust, appellant had a duty to defend the interests of the residuary legatees under the trust, the respondent's adversaries in the substantive dispute. Because the appellant could not affirmatively represent either party without violating a fiduciary relationship, it remained neutral. The respondent hired counsel on her own initiative.

Under these circumstances, the respondent, as a beneficiary of the estate of Josephine C. Hoyt, is entitled to recover her attorneys fees from the estate.

Had the appellant discharged its duty to defend her interests as executor, it could have reimbursed itself from the estate for all expenses of litigation.[1]

Because the respondent, on her own initiative discharged the executor's duty, under these circumstances, to defend the estate, and in effect assumed the executor's obligatory role, she is entitled to have the expenses of litigation satisfied from the estate.

In a situation where the challenge to the estate distribution plan is made by a party other than a specific beneficiary, residuary legatee, or creditor of the estate, and the claim is resisted by a beneficiary, assuming the obligation of an executor who cannot act because of a conflict of interest arising from his relationship with the challeng-

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[1] *Heiss v. Murphy* (1877), 43 Wis. 47.

"... an executor or administrator is to be allowed his reasonable payments for the advice and assistance of counsel in the conduct of the affairs of the estate, when necessary." 2 Callaghan's Wisconsin Probate Law (6th ed.) p. 204, sec. 13.45.

ing party, the rationale of the "equitable, extraordinary circumstances" doctrine requires that the defending beneficiary recover attorneys fees and costs from the estate. The "extraordinary circumstances" rationale is a theory of equitable relief developed in disputes involving distribution of decedents estates, as an exception to the general principle that a losing party must at least bear his own costs of litigation.

Although the rationale was initially developed in contexts in which an attorney who performed services for the executor was permitted to recover his fees from the estate upon a showing of insolvency or inability to pay on the part of the executor,[1] the logic of this doctrine has been applied in a manner to permit those who discharge the executor's clear duties to litigate to protect the estate, to recover the costs of litigation from the estate.

In the *Estate of Sheldon*,[2] an executor, as executor, approved his own claim against the estate as creditor. A beneficiary of the estate resisted the claim. The beneficiary did not prevail on the merits in this court; nevertheless her attorneys fees, both at the trial and in this court, were allowed from the estate. The court reasoned, at p. 432:

> "It is the duty of the administrator to protect and conserve the estate committed to his care, and where the interest of an administrator is adverse to the estate the intervention by a legatee may be reasonably necessary and prudent, and where the result of such intervention adds to the estate or trust fund, a finding that the legatee so intervening is equitably entitled to reasonable compensation from the estate or trust fund presents no error of law."

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[1] *Estate of Arneberg* (1924), 184 Wis. 570, 200 N. W. 557; *Juergens v. Ritter* (1938), 227 Wis. 480, 279 N. W. 51.

[2] (1946), 249 Wis. 430, 24 N. W. (2d) 875.

The beneficiary's intervention under these circumstances was deemed necessary to avoid a situation in which an executor could potentially use his position of trust for personal aggrandizement. To ensure that an executor will discharge his position of trust, a beneficiary must be permitted to challenge his actions, and even if the executor's action is deemed proper at the termination of litigation, the defending beneficiary is entitled to compensation from the estate for the costs of litigation for performing the watchdog function.

Although it is obvious that the appellant's refusal to represent Helen Bischoff was not self-seeking in the sense of the *Sheldon Case*, *supra*, the concern that executors fully discharge their obligations of trust, the attitude which underlies the *Sheldon* rationale, requires the conclusion that when a conflict of interest, created in part by the executor's own actions, prevents the executor from discharging a clear duty to defend the estate distribution plan by litigation, the cost of such defense is not to be shifted to the single beneficiary who chooses to defend the estate, albeit motivated by her own economic interest. The paralyzed position of the executor is an extraordinary circumstance justifying the allowance of respondent's fees and expenses from the estate of Josephine C. Hoyt.

By the Court.—Order affirmed.

Dissenting Opinion in re Estate of Josephine C. Hoyt

In

SUPREME COURT

STATE OF WISCONSIN

AUGUST TERM, 1963

No. 2

In re Estate of Josephine C. Hoyt, Deceased:

FIRST WISCONSIN TRUST CO., Ex'r., etc.,

Appellant,

—v.—

HELEN BISCHOFF,

Respondent.

CURRIE, *J.* (dissenting): I respectfully dissent from the opinion of the court.

The 999 shares of capital stock of the Patrick Cudahy Family Company to which Article VI of the will relates constituted part of the assets of an *inter vivos* trust. Under the provisions of the trust there was no possibility of any of these 999 shares becoming part of the assets of the estate of testatrix Josephine C. Hoyt. As fully explained in our opinion in *In re Patrick Cudahy Family Trust, ante*, p. 198, 125 N. W. (2d) 344, at the time testatrix died the only right which testatrix had with respect to such 999 shares, was that of exercising a testamentary power of appointment to appoint the dividends payable on such shares to someone else for life. If she failed to exercise the power of appointment, or if because of her prior partial release

of the power of appointment the attempted exercise of the power was void, the dividends from the 999 shares of stock did not become an asset of the estate. The proceeding in which Helen Bischoff had incurred the expenditure for counsel fees and costs was not the instant estate proceeding, but one involving only the *inter vivos* trust.

My first point of disagreement with the majority opinion is the holding that an absolute duty rested upon the executor to enter an appearance in the trust proceeding and there do battle to compel the trustee to recognize the attempted exercise of the power made in favor of Helen Bischoff by Article VI of the will. The executor was not even a proper party in the trust proceeding. An appointee under a power of appointment does not take from the donee of the power. Except for this, the position of the appellant as executor of Mrs. Hoyt's will is comparable with the situation that would have obtained if the respondent has been a specific devisee of realty under the will and someone had asserted an adverse title based on an *inter vivos* transfer. Title to the realty would not have passed to the executor. It would have passed directly to the devisee and the executor would have had no claim to the realty nor to its possession, in the absence of a showing of insufficient personal property to pay debts and administration expenses. Mac Donald, The Rights of a Wisconsin Personal Representative in the Real Estate of his Decedent, 1960 Wis. Law Review, p. 363. Nor would the executor have been a proper party to any proceeding to enforce the title of the devisee. *Marsh* v. *Board of Supervisors* (1875), 38 Wis. 250; *McManaway* v. *Sheridan* (1892), 81 Wis. 538, 51 N. W. 1011; *Volk* v. *Stowell* (1898), 98 Wis. 385, 74 N. W. 118; and *see Estate of Rieman* (1956), 272 Wis. 378, 75 N. W. (2d) 564.

Secondly, even if the executor were held to be a proper party in the trust proceeding, the executor ought not to

have incurred any expenditure for counsel fees and disbursements in that proceeding without first obtaining approval of the county court in the estate proceeding. No creditor or legatee in the estate proceeding has any financial interest in the dividends that are the subject of the exercise of the power which arise under the will. If the executor did apply to the county court in the estate proceeding for authority to incur expenses chargeable to the estate, in order to litigate in the trust proceeding the issue of the legal effect of the attempted exercise of the power, the county court should refuse to permit such expenditure where the appointee, here Helen Bischoff, has already engaged counsel to litigate the matter.

Thirdly, where no actual or potential benefit could accrue to the Josephine C. Hoyt estate from the services performed by counsel for Helen Bischoff in the litigation had in the trust proceeding, it should be held that Helen Bischoff's interest in this litigation was so adverse to that of the creditors and legatees of the estate that she should not have reimbursement from the estate for any expenses incurred for such counsel fees and costs. In *Estate of Dunge's* (1899), 103 Wis. 497, 518, 79 N. W. 786, this court stated that "courts should be cautious in allowing for services ostensibly rendered to executors, but in spirit and effect rendered to one of the opposing interests, which should bear its own expenses." See, also, *Estate of Fannelli* (1956), 274 Wis. 193, 203, 80 N. W. (2d) 240, and *Estate of Dennett* (1929), 200 Wis. 84, 227 N. W. 280. *Estate of Sheldon* (1946), 249 Wis. 430, 24 N. W. (2d), 875, cited in the majority opinion, is readily distinguishable from the instant case. In the *Sheldon Case* there was a potential benefit to the estate by engaging counsel in an effort to defeat the claim filed by the executor.

For the foregoing reasons I would reverse the order appealed from.

APPENDIX C

In re Patrick Cudahy Family Trust

Motion for Rehearing Pursuant to Section 251.65 W. S.

Appellant, HELEN BISCHOFF, and respondent-appellant, MICHAEL J. CUDAHY, hereby move for rehearing of the above entitled appeal upon the following grounds:

1. In ruling the "partial release" herein was sanctioned by the common law, this Court overlooked Section 232.01 Stats. which expressly abrogates all common law concerning powers;

2. In ruling that "it is immaterial whether the tax savings which Mrs. Hoyt sought to obtain were ultimately obtained" because "The document had independent legal significance", this Court has overruled *sub silentio*, *St. Thomas Gemeinde* v. *St. Matthews Church*, 191 Wis. 340, 210 N. W. 942 (1926); *Hoberg* v. *John Hoberg Co.*, 170 Wis. 50, 173 N. W. 639 (1919), and *Jenkins* v. *Bradley*, 104 Wis. 540, 80 N. W. 1025 (1849). In so doing the Court has destroyed the doctrine of equitable rescission for mistake of antecedent legal rights in this state, and

3. The refusal of equitable relief for mistake of antecedent legal rights under the Federal Estate Tax Laws constitutes a denial of due process of law and the equal protection of the laws within the meaning of the Fourteenth Amendment to the United States Constitution in respect of Mrs. Hoyt's and appellants' property interests.

Motion for Rehearing Pursuant to Section 251.63 W. S.

Appellants request the Court to afford them an opportunity to orally argue the above issues, before the Court.

Respectfully submitted,

MARTIN R. PAULSEN, Esq.
Attorney for Appellant,
Helen Bischoff.

VILAS H. WHALEY, Esq.
Attorney for Respondent-Appellant,
Michael J. Cudahy.

APPENDIX D

In re Patrick Cudahy Family Trust

Motion for Modification of Mandate

Appellant, HELEN BISCHOFF, and respondent-appellant, MICHAEL J. CUDAHY, hereby move for modification of the mandate to provide:

> "The County Court is directed to enter an order requiring the parties to frame issues pursuant to Section 263.40 W. S. relating to (a) the right of the Estate of Josephine C. Hoyt or appellants to secure equitable relief against the effectiveness of the partial release, and (b) the right of the Estate of Josephine C. Hoyt or appellants to obtain cancellation of the partial release in equity, and thereafter trial shall be had upon the issues as thus framed."

Respectfully submitted,

MARTIN R. PAULSEN, Esq.
Attorney for Appellant,
Helen Bischoff.

VILAS H. WHALEY, Esq.
Attorney for Respondent-Appellant,
Michael J. Cudahy.

APPENDIX E

Matter of Patrick Cudahy Family Trust, Etc.

Decision Denying Rehearing and Modification of Mandate

(Emblem)

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

FRANKLIN W. CLARKE
Clerk

Madison, March 31, 1964

To
Mr. Martin R. Paulsen
Mr. Lee W. Meyer, Milwaukee
Mr. Vilas H. Whaley, Racine
Messrs. Brady, Tyrrell & Bruce, Milwaukee
Messrs. Wickham, Borgelt, Skogstad & Powell, Milwaukee
Mr. Nathan Pereles, Jr., Milwaukee
Messrs. Whyte, Hirschboeck, Minahan, Harding & Harland, Milwuakee
Mr. Lester S. Clemons, Milwaukee

Sir:—

The Court today announced decision in your case as follows:

#90 In re Patrick Cudahy Family Trust: Helen Bischoff et al. v. First Wis. Trust Co., Trustee, et al.

Motion for rehearing denied with costs.

Respectfully yours,

FRANKLIN W. CLARKE,
Clerk of Supreme Court.

APPENDIX F

Wisconsin Statutes Involved

Section 232.01

"232.01 How far abolished. Powers, except as authorized and provided for in this chapter, are abolished; and the creation, construction and execution of powers shall be governed by the provisions herein contained."

Section 232.32

"232.32 Reservation of power. The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power so reserved shall be subject to the provisions of this chapter in the same manner as if granted to another."

Section 232.35

"232.35 When power irrevocable. Every power beneficial or in trust is irrevocable unless an authority to revoke it is reserved or granted in the instrument creating the power."

Section 232.40

"232.40 When made by will or devise, how executed. When a power of disposition is confined to a disposition by devise or will the instrument must be a will duly executed according to the provisions of law relating to wills of real and personal estate."

Section 232.46

"232.46 Directions to be observed. With the exceptions contained in the preceding sections the intentions of the

grantor of a power as to the mode, time and conditions of its execution shall be observed, subject to the power of the circuit court to supply a defective execution in the cases hereinafter provided."

Section 232.495 of 1957

"232.495 Release of powers.

"(1) The grantee of any power to appoint real or personal property may, unless the instrument creating such power expressly otherwise provides:

"(a) At any time completely release his power.

"(b) At any time or times release his power in any one or more of the following respects:

"1. As to the whole or any part of the property which is subject thereto;

"2. As to any one or more persons or objects, or classes of persons or objects, in whose favor such power is exercisable;

"3. So as to limit in any other respect the extent to or manner in which it may be exercised.

"(2) Any such release may be effected, either with or without consideration, by written instrument signed by the grantee or holder.

"(3) A release of a power executed prior to September 1, 1957, has the same effect as if this section had been in effect at the time such release was executed."

Wisconsin Statutes Involved

Section 232.495 of 1943

"232.495 Release of powers.

"(1) A power to appoint real or personal property, whether acquired prior to or subsequent to July 15, 1943, which is exercisable by deed, by will, by deed or will, or otherwise, in favor of the grantee or holder of the power, his estate, his creditors, or the creditors of his estate is releasable, either with or without consideration, by written instrument signed by the grantee or holder.

"(2) A power to appoint described in the next preceding subsection is releasable with respect to the whole or any part of the property subject to such power and is also releasable in such manner as to reduce or limit the persons or objects or classes of persons or objects in whose favor such power would otherwise be exercisable.

"(3) It is declared that such releases described in the 2 preceding subsections are in accordance with the public policy of this state and are valid and effectual whether made before or after July 15, 1943.

"(4) Nothing herein contained shall be deemed to prevent the release of any power which was releasable, in whole or in part, prior to July 15, 1943."

Office Supreme Court, U.S.
FILED
AUG 13 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 297

HELEN BISCHOFF,

Petitioner,

vs.

NATHAN PERELES JR., ETC., Et Al,

Respondents.

ANSWER OF GUARDIAN AD LITEM TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

NATHAN PERELES JR.
Guardian and Attorney
739 North Broadway
Milwaukee, Wisconsin 53202

HAMILTON-SMITH-KORTMEYER CO. MILWAUKEE

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

HELEN BISCHOFF,

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Respondents.

ANSWER OF GUARDIAN AD LITEM TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

JURISDICTION

The respondent asserts that this Court lacks jurisdiction under 28 U.S.C. §1257(3) for the reason that the decision of the Wisconsin Supreme Court below is based on an adequate non-federal ground. Certiorari should be denied under Rule 19.

QUESTIONS PRESENTED

1. Assuming a state court errs in refusing to set aside on equitable grounds a release of a power of appointment motivated by the desire to save federal estate taxes, does

this present a federal question because of denial of due process or equal protection of the laws?

2. If the state court in a case of first impression adopts as the common law of the state a majority rule embodied in the Restatement of Property as promulgated by the American Law Institute, has the state court thereby improperly avoided a claim that state statutes validating the release impaired any obligation of contract or violated due process because retroactive?

STATEMENT

Respondent wishes to supplement the petitioner's statement of the case by adding the following facts from the record:

With reference to the release by Mrs. Josephine C. Hoyt of her power to appoint reserved by her and her brothers and sisters under the Trust Indenture, which release is dated February 25, 1944 and which was identical with the release executed by her brother and her sisters, the only living parties who created said Trust Indenture, the said release was transmitted to Mrs. Hoyt by attorneys for the said parties, Wood, Warner, Tyrrell & Bruce, in a letter dated February 21, 1944 and which closed with the following statement:

> "You must understand that by this instrument you forever limit your possible appointees to the persons within the limited class specified in the release. We suggest that you re-examine your will to be certain that it states your present desires in the matter."

The entire letter appears in Appellant's Appendix, Record Page 286 of the Wisconsin Supreme Court Record.

Attention is also directed to a letter from the same attorneys, dated January 19, 1944 in this matter, the last paragraph reading:

> "We call to your attention that before taking any action the subscribers should carefully consider the effect upon them of the release of their powers. The tax advantage must be weighed against any disadvantage resulting from the limitation upon or the complete loss of the power of appointment. For instance, if a subscriber now having natural issue should fully release his power and such issue should die, the subscriber would have no power to appoint someone else to receive his share of the dividends after his death, and such dividends would then go to the other subscribers or this issue. Such a subscriber might prefer to release his power only partially, in the same manner as suggested above for those subscribers who have adopted children, and thus run the rather slight risk of a change in the Regulations or in administrative policy referred to at page 5 above. The wishes of each individual subscriber in accordance with his own particular situation must, of course, govern his own decision in the matter. We shall be glad to discuss this practical phase of the matter with you if you so desire." (Ap. Appendix, Record p. 281, Ex. 10).

ARGUMENT

This case represents an attempt by petitioner to manufacture a federal question out of a purely private law case properly handled by the trial court and affirmed by the Wisconsin Supreme Court after full and elaborate argument by petitioner, with a rehearing denied without opinion. The case is very simply this: the state courts have found that a partial release of a testamentary power of appointment, executed in 1944 by Mrs. Hoyt, who retained the power over shares transferred by her into a

family trust in 1918, was valid under the common law of Wisconsin aside from a statute enacted in 1943 and amended in 1957 expressly authorizing release; that even though the partial release was executed in order to diminish federal estate taxes on Mrs. Hoyt's estate, the release was made under the guidance of Mrs. Hoyt's lawyers and was intended to have, and did have, significance apart from the tax consequences, whether or not tax savings were ultimately obtained; hence the partial release was effective and binding on Mrs. Hoyt and those claiming under her, and a later attempt by her to exercise in favor of petitioner the power which no longer existed was a nullity.

The only federal issue raised in the lower courts related to the constitutionality of Wis. Stat. 232.495 (1943) and the amended version of the same statute as enacted in 1957. Any due process question arising from the alleged retroactivity of a curative provision in the 1957 statute and alleged impairment of obligation of contract based on application of the 1943 or 1957 statutes to the release of a power created under the 1918 Trust Agreement were effectively eliminated from the case by the decision of the Wisconsin Supreme Court that the release was valid under the common law apart from the validating statutes. This non-federal ground is adequate to support the judgment. In affirming the trial court, the Wisconsin Supreme Court adopted as the common law of the state the prevailing rule regarding release as stated in the Restatement of the Law of Property, promulgated by the American Law Institute in 1948 and, in so doing, overruled no prior Wisconsin case law (1948 Supplement Topic 4 pages 504-508).

We contend that this Court lacks jurisdiction over the case and urge the Court to deny the petition for certiorari for the following reasons:

1. Refusal of the Wisconsin Supreme Court to reverse the trial court and order the release set aside in equity upon the grounds of mistaken reliance upon federal tax law was not a denial of due process or the equal protection of the laws. The decision of the Wisconsin courts, that there was in fact no mistake even though a subsequent change in the tax laws have made execution of the release unnecessary, was correct. The decision did not conflict with prior Wisconsin rulings, and even if it did, this would not raise a question of due process or equal protection. The decision was not arbitrary or discriminatory. Nor does the refusal of the Wisconsin Supreme Court to set aside the release raise a federal issue merely because the federal estate tax laws were a motivating factor in the transaction, or because the decision may conflict with decisions of other states, or because some of the members of this Court have expressed concern about the impact of tax changes.

2. The decision of the Wisconsin Supreme Court based on the common law of Wisconsin eliminated any question of the constitutionality of the Wisconsin Statutes relating to release of powers of appointment. This non-federal basis for the decision was an exercise of the judicial technique of avoiding unnecessary constitutional issues, advocated by this Court and practiced by every court dealing properly with grave constitutional issues. There was no "improper avoidance" of the federal question, since there was sound basis for the common law rule adopted by the Wisconsin Court in a case of first impression.

A.

NO DENIAL OF DUE PROCESS OR EQUAL PROTECTION OF THE LAWS

Both Congress and this Court have long recognized that it is not the function of this Court to sit in review of substantive matters of state law unless a federal question is involved. As Chief Justice White said in *McDonald v. Oregon Railroad and Navigation Company*, 233 U.S. 665 (1914):

> "It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not . . . give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character."*

See also *Castillo v. McConnico*, 168 U.S. 674 (1898). Any other approach would convert all substantive law problems into federal questions under the guise of due process or equal protection.

However, since a claim of denial of due process and equal protection of the laws is not to be taken lightly, we deem it proper to analyze the substantive issues in some detail, in order to eliminate any question of arbitrary decision on the part of the Wisconsin Supreme Court. As we understand petitioner's claim, it is based on failure of the Wisconsin Supreme Court to grant relief on the basis of certain "equities" in petitioner's favor, allegedly contrary to established Wisconsin law dealing with mistake. It is fitting to start with the opinion of the Wisconsin court on this point:

> "We must first resolve whether the partial release of the power of appointment was effective. The exe-

*Followed in *Gasquet v. Lapeyre*, 242 U.S. 370, 61 L.Ed. 370 (1917)

> cution of the instrument by Mrs. Hoyt on February 25, 1944 was a deliberate and meaningful act. Prior to its preparation and execution, Mrs. Hoyt had the guidance of an analytical report from her lawyers; they recommended the partial release in order to diminish federal estate taxes on Mrs. Hoyt's estate. We consider that in the issue before us it is immaterial whether the tax savings which Mrs. Hoyt sought to obtain were ultimately obtained. The document had independent legal significance even though its purpose was to gain a specified tax benefit." 22 Wis. (2d) 198, 206.

In understanding this position of the court it is helpful to note certain factors: (1) the 1944 release by Mrs. Hoyt was undertaken only after careful deliberation on the basis of competent legal advice; (2) the release stated that it was irrevocable and Mrs. Hoyt was warned to consider the non-tax consequences of the release; (3) on the basis of then-known tax law there was no mistake; (4) the release could have achieved tax savings had Mrs. Hoyt died prior to the Powers of Appointment Act of 1951 or had Congress not changed the taxation of powers of appointment by that Act. The state courts quite properly decided that nothing in the Wisconsin case law regarding mistake would justify setting aside a document under such circumstances. The existing Wisconsin cases on mistake involved no fact situations remotely similar to this. The Wisconsin Supreme Court apparently regarded them as unworthy of mention in a situation where a party, competently advised by legal counsel, fully cognizant of the risks involved, and carefully warned to weigh both tax advantages and nontax consequences, deliberately executes a formal legal document. Relief for mistake is a highly intricate problem which courts of equity have always decided more or less on an individual case basis.

anyway. We do not believe that, under the concept of equal protection or due process or any other doctrine, this Court ever has or now wants to sit in review on state substantive law questions of this nature.

Petitioner, on pages 23-25 of her petition, attempts to manufacture a due process question out of an alleged conflict between the decision of the Wisconsin Supreme Court as to equitable relief and the decisions of three other states. The 14th amendment does not require any state to follow the decisions of other states on matters of local law. Moreover, upon careful analysis it will be seen that the conflict is more apparent than real. For example, petitioner relies heavily on *Stone v. Stone*, 319 Mich. 194, 29 N.W. 2d 271 (1947 — "a case without a substantive distinction". But in *Stone* the taxpayer found himself in the impossible situation of having transferred the right to partnership income and then being held still liable for taxes on the income which was no longer his (unless he were afforded relief by way of rescission). This was a clear case of hardship and a far cry from the instant case where Mrs. Hoyt had merely restricted her power of appointment by partial release to a power to appoint among her family group and where her estate would have realized tax advantages had she died prior to 1951 when the statute was changed. Even on the facts of the *Stone* case the decision was subjected to criticism in the law reviews on both doctrinal and policy grounds. See Note, 48 Col. L. Rev. 470 (1948); Note 61 Harv. L. Rev. 553, 554 (1948); Comment, 46 Mich. L. Rev. 1079 (1948).

Petitioner attempts to give some federal "color" to her claim by arguing that Mrs. Hoyt, in executing the release, relied to her detriment on both an erroneous interpretation of the federal estate tax law by this Court and

a federal tax statute which was later changed by Congress. We have no doubt the Court will readily see through this argument. Merely because federal taxes were one motivating factor, or even the sole motivating factor, in the transaction which petitioner seeks to set aside, does not make the entire transaction a federal issue. This is not a case involving interpretation of the federal tax statute or affecting the administration of federal tax law. Hundreds of ramifications of federal tax law are left to state law for determination. A simple and common example is the problem of impact of federal estate taxes on distribution of the decedent's estate. Here there is a wide difference in treatment between states, some imposing the burden on the residue, others applying statutory or decisional rules for apportionment among all beneficiaries, with the testator free to establish his own rule by testamentary provision. In order for a case to arise under a federal statute, it must have a far more direct connection with the statute than the cause of action in this case has.

Nor do the facts of the case support petitioner's claim. Petitioner states (p. 20): "We are concerned solely with rescission of such transfers where it can be shown the taxpayer relied to his detriment on an erroneous statutory construction by this Court. This is such a case." But the fact is that this is *not* such a case. It is true that Mrs. Hoyt executed the partial release in 1944 in light of the decision of *May v. Heiner*, 281 U.S. 238 (1931), which was subsequently overruled in *Commissioner v. Church*, 335 U.S. 632 (1949), but her own counsel had cautioned against the possibility that the Court might shift its position on this score (A. Ap. 194-195). And even had there been full reliance, no detriment would ever have resulted to Mrs. Hoyt or her estate therefrom. This is because prior to the time when this Court on its own

motion invited counsel in the *Church* case to discuss the reserved life estate, the Internal Revenue Department had made no effort to assess an estate tax on this basis alone. See Lowndes and Kramer, Federal Estate and Gift Taxes (2d ed. 1962) pp. 94-95; Warren and Surrey, Federal Estate and Gift Taxation (1961) ed. p. 444. Moreover, as Mrs. Hoyt's counsel properly pointed out in 1944, there would have been a strong argument of res judicata based on the ruling in *Helmholz v. Commissioner*, 28 B.T.A. 165 (1933) involving the same family trust, if Mrs. Hoyt had died between 1944 and 1949 and an attempt been made to tax the estate on the basis of the reserved life estate. Immediately after the decision in the *Church* case, Congress restored the rule of *May v. Heiner* by the Technical Changes Act of 1949 (63 Stat. 891). Thus any claim of detriment to Mrs. Hoyt by reliance on *May v. Heiner* was forever eliminated from this case.

The crucial tax question in 1944 was the section of the 1942 Revenue Act imposing a tax on the basis of Mrs. Hoyt's power of appointment unless it were released. Petitioner claims that Congress "induced" the release by the provisions of the tax law. Of course, this is a purely semantic attempt to place the blame on Congress for estate planning. The later change in the law relating to powers of appointment (the Powers of Appointment Act of 1951) exempting certain pre-1942 powers from taxation is the only reason Mrs. Hoyt might ever have considered questioning the validity of her own release! Surely this Court would not espouse a doctrine that, whenever Congress changes a tax law, persons can set aside — on the basis of "federal law" — fully executed transfers of property planned on the basis of the former law. Gifts are made, trusts are established, insurance is purchased, corporations are formed, investments are made, business

contracts are entered into, employment arrangements are accepted — all with some degree of reliance on existing federal tax law.* We join with petitioner and with the Justices of this Court who have expressed concern over the impact of change in tax structure. But this is a policy reason against sharp change in the tax laws and their interpretation. It is not a reason for converting into a federal question the complex property problem of unscrambling all the transactions made on the basis of a tax law later changed by Congress (or, for that matter, reinterpreted by this Court). Change is to be expected, and loss of flexibility is a risk all estate planners accept as a price of achieving tax minimization.

B.

NO CONTRACT OBLIGATIONS IMPAIRED

While a constitutional issue might be posed had the Wisconsin Supreme Court based its decision on the Wisconsin statutes relating to release, the Wisconsin Supreme Court quite properly avoided the issue by deciding the case on the alternative ground that, aside from statute, the release was valid under the common law of the State of Wisconsin. It is well established that the contract clause prohibits impairment only by subsequent legislation, not by judicial decision. *Tidal Oil Co. v. Flanagan*, 263 U.S.

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*While it is of course perfectly proper to take advantage of tax-saving provisions of the revenue laws, it would be unsound policy to encourage tax-motivated transfers by allowing rescission or revocation if such transfers later proved unsuccessful or unnecessary in achieving tax savings. Professor Walter Blum, in an article in the Journal of Taxation, Vol. 10, p. 300 (1959) dealing with the problem of arrangements contrived to minimize taxes, observed:

> "Furthermore, it may be that our system is deficient in not penalizing unsuccessful experiments more heavily than now in view of the costs, which they impose on the whole legal apparatus."

444 (1924); *Fleming v. Fleming*, 264 U.S. 29 (1924); *Barrows v. Jackson*, 346 U.S. 249 (1952).

Petitioner argues (p. 17, 23) that the Wisconsin Court "improperly avoided" the constitutional issue. But this Court has long approved the judicial technique of avoiding constitutional issues when unnecessary to the decision. This case in no way resembles *Davis v. Wechsler*, 263 U.S. 22 (1923) or *NAACP v. Alabama*, 357 U.S. 449 (1958) where novel state procedural requirements were made the basis of avoiding federal review of constitutional rights.

It ought to be a sufficient answer to petitioner's claim that the decision of the Wisconsin Supreme Court is based on a majority common law rule approved by the American Law Institute in its Restatement of Property and that petitioner can point to no prior Wisconsin case dealing with a power of appointment of this type. Unless for some reason this basis is untenable, this Court has no ground to review the decision. We do not need to remind the Court of its function in a case such as this. As Justice Stone said in *Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930): "But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." See also *Demorest v. City Bank Co.*, 321 U.S. 36 (1944).

Petitioner urges that the chapter of the Wisconsin statutes dealing with powers (Wis. Stat. ch. 232), in force in 1918 when the trust agreement was entered into, foreclosed adoption of the common law and hence prevented release of any powers except those for which re-

lease is expressly authorized by statute. The Wisconsin Supreme Court failed to find any language in Sec. 232.01 or other sections of that chapter from which such an absurd conclusion could be drawn. No section of the statutes in 1918 prohibited release, and the "code" approach urged by petitioner, from which a negative inference might be raised, has been rejected in states adopting the New York property statutes. See Simes and Smith, Law of Future Interests (2nd ed.) 1081:

> "While one might infer from the language of the New York legislation that all common law doctrines concerning powers of appointment are abolished, it would seem that this is not actually the case. Actually the common law must be relied upon at times to interpret the language of the statutes and to fill gaps not covered by them."

See also Fowler, Real Property Law of the State of New York (3rd. ed.) 578; Chaplin, Express Trusts and Powers (1897) 422.

An additional reason is the express finding of the Wisconsin Supreme Court that no contract rights were involved here, that the power of appointment was a property right reserved by Mrs. Hoyt when she transferred her shares of stock into the Patrick Cudahy Family Trust, just as she reserved the income from such shares. Although recognizing that a trust such as the one here involved may embody contractural burdens amongst those who establish the trust, the Wisconsin Supreme Court correctly ruled: "We construe the provision for a power of appointment in the instant case to constitute a reserved property right in the settlor as distinguished from a contractural or primissory obligation with reference to the power." Mrs. Hoyt was under no obligation (contractural or otherwise) to exercise the power at all.

and no one else can claim that any right has been impaired.

Finally, were it relevant to the issue, we could demonstrate that the Wisconsin legislation as applied to pre-existing powers of appointment is perfectly valid. Without expanding, we merely call attention of the Court to *Chanler v. Kelsey*, 205 U.S. 466 (1906) holding that a state inheritance tax statute could apply to existing powers of appointment without contravening either due process or the contract clause; and to *Satterlee v. Matthewson*, 2 Pet. 380 (1829) and *Watson v. Mercer*, 8 Pet. 88 (1834) upholding state statutes validating prior property transactions on the grounds that giving effect to the intent of a party as to confirm, not impair, rights.

CONCLUSION

There is no substantial federal question affording a basis for jurisdiction of this Court. The petition should therefore be denied.

Respectfully submitted,

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